(6)

No. 90-838-CFX
Status: GRANTED

Title: Shirley M. Molzof, Personal Representative of the Estate of Robert E. Molzof, Petitioner
v.
United States

Docketed:
November 27, 1990

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Rottier,Daniel A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 27 1990	G	Petition for writ of certiorari filed.
3	Jan 2 1991		Order extending time to file response to petition until February 6, 1991.
4	Feb 5 1991		Order further extending time to file response to petition until February 19, 1991.
5	Feb 19 1991		Brief of respondent United States in opposition filed.
6	Feb 20 1991		DISTRIBUTED. March 15, 1991
7	Mar 18 1991		Petition GRANTED.
			**********
8	Mar 28 1991		Record filed.
		*	certified copy of original record on appeal
9	Apr 2 1991		Record filed.
		*	certified copy of C.A. proceedings
10	Apr 25 1991	G	Motion of petitioner to dispense with printing the joint appendix filed.
11	May 2 1991		Brief of petitioner Shirley M. Molzof, etc. filed.
12	May 13 1991		Motion of petitioner to dispense with printing the joint appendix GRANTED.
14	May 16 1991		Order extending time to file brief of respondent on the merits until June 17, 1991.
15	Jun 17 1991		Brief of respondent United States filed.
16	Jul 19 1991		Reply brief of petitioner Shirley M. Molzof, etc. filed.
17	Jul 30 1991		CIRCULATED.
18	Sep 5 1991		SET FOR ARGUMENT MONDAY, NOVEMBER 4, 1991. (2ND CASE).
19	Nov 4 1991		ARGUED.

90-838

No. _____

In The

Supreme Court of the United States

October Term, 1990

SHIRLEY M. MOLZOF, as personal representative of the Estate of ROBERT E. MOLZOF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. How should the term "punitive damages," as used in 28 U.S.C. §2674, Federal Tort Claims Act, be defined?

2. Is a veteran, who is entitled to receive free medical care from the Veterans' Administration pursuant to 38 U.S.C. §610, entitled to recover damages for future medical expenses in an action under the Federal Tort Claims Act arising from the medical negligence of Veterans' Administration employees?

LIST OF PARTIES

The parties to these proceedings are petitioner Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, and respondent United States of America.

The claim of Robert E. Molzof, which is the subject of these proceedings, was originally brought by his guardian ad litem, Thomas H. Geyer. After the entry of final judgment in the United States District Court for the Western District of Wisconsin, but before the filing of the Notice of Appeal in the United States Court of Appeals for the Seventh Circuit, Robert E. Molzof died. Accordingly, Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, was substituted as plaintiff-appellant in the appellate court.

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Wisconsin has not been reported. The oral Findings of Fact and Conclusions of Law of that court are reprinted in the appendix to this petition at pages App. 10-App. 24. The Memorandum and Order of that court is reprinted in the appendix, at pages App. 26-App. 29.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Molzof v. United States*, 911 F.2d 18 (7th Cir. 1990). The opinion is also reprinted in the appendix, at pages App. 1-App. 9.

JURISDICTION

This case involves the review of a judgment of the United States Court of Appeals for the Seventh Circuit entered on August 30, 1990.

This Court has jurisdiction to review judgments of the courts of appeal by writ of certiorari, as provided in 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1346(b), United States as defendant

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment,

under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674, Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

38 U.S.C. §351, Benefits for persons disabled by treatment or vocational rehabilitation

Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Veterans' Administration, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

38 U.S.C. §610, Eligibility for hospital, nursing home, and domiciliary care.

Included in the appendix.

STATEMENT OF THE CASE

I. Nature Of The Case.

This is an action under the Federal Tort Claims Act seeking recovery of damages for personal injuries sustained by Robert E. Molzof on November 2, 1986, as a result of medical negligence on the part of employees of a Veterans' Administration hospital where Mr. Molzof was a patient.

II. Statement Of Facts, Procedural History Of The Case, And Disposition In The Courts Below.

On October 31, 1986, Robert E. Molzof underwent surgery to remove a lobe of his lung at the William S. Middleton Memorial Veteran's Hospital in Madison, Wisconsin. As part of his post-operative care, he was temporarily placed on a ventilator. On November 2, 1986, employees of the hospital disconnected the alarm system on his ventilator and while the alarm was disconnected, a tube providing oxygen to Mr. Molzof became disconnected. The tube disconnection was discovered eight minutes later, at which time, Mr. Molzof's heart rate was between 30 and 40 beats per minute. By the time a physician arrived, Mr. Molzof was in complete cardiac arrest. He was not resuscitated until almost a half hour later. As a result of this episode, Mr. Molzof suffered anoxic encephalopathy. (R. 38:2) In other words, he suffered irreversible brain damage due to oxygen deprivation.

As a result of the anoxic encephalopathy, Mr. Molzof was in a permanent vegetative state. He required a ventilator for assistance in breathing and a nasogastric tube for nutrition and hydration. (R. 38:4) He was in need of hospitalization for the balance of his life, and resided at

the Veterans' Administration Hospital in Tomah, Wisconsin at the time of trial. (R. 38:3-4)

On September 29, 1988, Robert E. Molzof and his wife, Shirley M. Molzof, commenced this action against the United States of America seeking recovery of the damages they had sustained as a result of the hospital employees' negligence. The action was commenced in the United States District Court for the Western District of Wisconsin, and jurisdiction in that court was based upon 28 U.S.C. §1346(b) and on Chapter 171 of Title 28 of the United States Code.

The United States admitted that the hospital employees were negligent and that such negligence caused brain damage to Mr. Molzof. (R. 5:1; 38:2-3) Since the United States admitted liability, only the issue of damages was tried before the court, Judge John C. Shabaz, presiding. (R. 74; 75; 76) The court subsequently made oral findings of fact and conclusions of law, including the following:

FINDINGS OF FACT

1. Based on a consideration of the testimony of three expert witnesses and a summary of Mr. Molzof's medical records, the court determined that Mr. Molzof had a life expectancy of three years at the time of trial. (R. 76:329-30; App. 11)

2. The care received by Mr. Molzof at the Veterans' Administration Hospital in Tomah, Wisconsin was reasonable, necessary and adequate. (R. 76:330-31; App. 11-App. 12)

3. Shirley Molzof was satisfied with the services provided to her husband, except that she was concerned with the lack of communication between her and the

medical profession, the failure to provide physical therapy to her husband, and with the fact that visits by physicians occurred once per month, rather than more often. (R. 76:331; App. 12)

4. Mrs. Molzof had not shown to the satisfaction of the court that additional places of care, other than the Veterans' Administration Hospital in Tomah, were available. Although care at one hospital in Madison, Wisconsin may have been available, Mrs. Molzof had not demonstrated that the care provided there would have been the same or similar to that provided at the Veterans' Administration Hospital. (R. 76:331-32; App. 13)

5. The medical testimony most favorable to the Molzofs suggested that Mr. Molzof not be transferred to another hospital. (R. 76:332; App. 13)

6. Mrs. Molzof had no intention at the time of trial to transfer her husband to another institution. (R. 76:332; App. 13-App. 14)

7. At the Veterans' Administration Hospital in Tomah, there was a physical therapy staffing shortage, a lack of sufficient respiratory therapists, and a lack of weekly visits by the doctor. (R. 76:332; App. 13)

8. The costs of providing similar treatment to Mr. Molzof at a private institution were the following: the per diem rate was $915 per day, annualized at $333,975; respiratory therapy at a rate of $50 per visit, three visits per day, annualized at $54,750; physical therapy at a rate of $50 per visit, one visit per week, annualized at $2,600; occupational therapy at a rate of $50 per visit, one visit per month, annualized at $600; the stipulated cost of disposable equipment was $37,388.88 per year; the stipulated cost of medication was $12,229.13; and the stipulated cost of medical attention was $2,340 per year. (R. 76:332-33; App. 14)

CONCLUSIONS OF LAW

1. Because Mr. Molzof was entitled to free medical care from the Veterans' Administration for the remainder of his life, he was not entitled to recover damages for future medical care, except for the care which was not being provided at the Veterans' Administration Hospital in Tomah. (R. 76:334-36; App. 15-App. 16)

2. It was not in the best interest of Mr. Molzof to move him from the Veterans' Administration facility to other hospitals, and Mrs. Molzof had no intention to have Mr. Molzof moved to another facility. (R. 76:336; App. 16-App. 17)

3. The care provided at the Veterans' Administration Hospital was adequate, reasonable and necessary. Mr. Molzof was entitled to continue to receive adequate, necessary and reasonable hospitalization at the level which he was receiving at the time of trial, and such hospitalization should continue throughout the rest of his life. The court concluded that in addition to the care which Mr. Molzof was receiving at the time of trial, he should receive physical therapy of one visit per week, at $50 per visit, annualized at $2,600; he should receive additional respiratory therapy of one visit per day, at $50 per visit, annualized at $18,250; and he should receive additional medical attention in the form of physician visits, in the amount of $1,800 per year. The court concluded that such medical care was to be provided for the three-year remaining life expectancy of Mr. Molzof. (R. 76:336-37; App. 17-App. 18)

4. The court concluded that an award greater than that provided by the court for future medical needs would be a double recovery, and would also be punitive in nature to the United States, since the government would be providing medical care through the balance of

Mr. Molzof's life, but would nonetheless be required to pay damages for Mr. Molzof's future medical needs, which would not be used for that purpose. (R. 76:337-38; App. 18)

5. Mr. Molzof was not entitled to recover damages for loss of enjoyment of life. Any damages for loss of enjoyment of life would not have been compensatory to him, since he was comatose. Since such damages were not compensatory, they were punitive in nature and could not be awarded under the Federal Tort Claims Act. (R. 76:338-40; App. 18-App. 21)

On July 12, 1989, Judge Shabaz issued a Memorandum and Order (R. 68; App. 26-App. 29), which was subsequently amended by a corrected memorandum issued on August 15, 1989. (R. 77; App. 32-App. 33) In its memorandum, the court essentially reiterated its conclusions of law. The court determined that Mr. Molzof was entitled to future reasonable, necessary and adequate care, to include full hospitalization for the remainder of his life at a Veterans' Administration hospital, together with $7,800 for physical therapy, $54,750 for respiratory therapy, and $5,400 for weekly physician's visits, for a total of $67,950. (R. 77; App. 32) The court also determined that an adequate award for loss of enjoyment of life, if such an award were permissible under the law, would be $60,000. (R. 68:3; App. 28)

On July 12, 1989, judgment was entered in favor of Mr. Molzof against the United States in the amount of $67,950, and the government was ordered to provide Mr. Molzof with reasonable, adequate and necessary care, to include hospitalization for the remainder of his life at a Veterans' Administration facility. (R. 69; App. 30-App. 31)

Robert Molzof appealed from that portion of the judgment entered on July 12, 1989 in which he was

denied an award for future medical expenses and denied an award for loss of enjoyment of life.

On August 30, 1990, the United States Court of Appeals for the Seventh Circuit issued its decision. (App. 1-App. 9) The appellate court held that Mr. Molzof was not entitled to recover damages for future medical care in an amount in excess of the $67,950 (erroneously stated by the appellate court to be $75,750) awarded by the district court. The appellate court reasoned that since Mr. Molzof was entitled to receive free medical care from the Veterans' Administration and since there was no evidence indicating that he was not going to receive such free care, any greater award for future medical expenses would be duplicative and punitive and hence barred by the Federal Tort Claims Act prohibition of "punitive damages." The court also held that Mr. Molzof was not entitled to recover damages for loss of enjoyment of life since Mr. Molzof, being comatose, would not be able to benefit from the money. Such damages would, therefore, not be compensatory, but would be punitive in nature and were thus barred by the Act. Accordingly, the appellate court affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

The appellate court's refusal to allow Mr. Molzof to recover any amount more than $67,950 for future medical expenses and its refusal to allow him to recover damages for loss of enjoyment of life were based on the court's determination that such damages would be punitive in nature and would violate the prohibition in 28 U.S.C. §2674 against "punitive damages." The definition of "punitive damages" on which the court relied, although utilized by some courts of appeal, is not followed by other courts of appeal. Moreover, the decision of the

appellate court disallowing full recovery for future medical expenses is in conflict with the decisions of the courts of appeal which have addressed the issue of whether a veteran, who is entitled to receive free medical care from the government, is also entitled to be compensated for future medical expenses in an action brought under the Federal Tort Claims Act.

I. THERE IS A CONFLICT IN THE COURTS OF APPEAL CONCERNING THE DEFINITION OF "PUNITIVE DAMAGES" FOR PURPOSES OF THE FEDERAL TORT CLAIMS ACT, AND REVIEW BY THIS COURT WILL RESOLVE THE CONFLICT.

In an action brought under the Federal Tort Claims Act, the components and measure of damages are controlled by the law of the state where the tort occurred. *Richards v. United States*, 369 U.S. 1, 6-10 (1962); 28 U.S.C. §1346(b). The Federal Tort Claims Act provides, however, that the United States "shall not be liable . . . for punitive damages." 28 U.S.C. §2674. The Act does not specify whether federal standards or state standards should be used in determining which damages are punitive in nature and which are compensatory.

Faced with arguments by the government that certain elements of damages awarded pursuant to state law in Federal Tort Claims actions were punitive in nature, several courts of appeal have been required to decide whether state law damage elements are punitive or compensatory. The courts of appeal have concluded that federal law is controlling on this issue, and they have adopted a federal law definition of "punitive damages." The courts, however, have not adopted the same definition. Courts in the First, Fourth, Fifth and Ninth Circuits have defined "punitive damages" to mean any damages in excess of the amount necessary to compensate the

claimant. *D'Ambra v. United States*, 481 F.2d 14 (1st Cir. 1973), cert. denied, 414 U.S. 1075 (1973); *Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Hartz v. United States*, 415 F.2d 259 (5th Cir. 1969); *Felder v. United States*, 543 F.2d 657 (9th Cir. 1976). Other courts of appeal have defined "punitive damages" to mean those damages which are based on the culpability of the tortfeasor's conduct and which are meant to punish the tortfeasor. This definition has been adopted by courts in the Second, Sixth and Eighth Circuits. *Rufino v. United States*, 829 F.2d 354 (2nd Cir. 1987); *Kalavity v. United States*, 584 F.2d 809 (6th Cir. 1978); *Manko v. United States*, 830 F.2d 831 (8th Cir. 1987). This definition has also found support in the Ninth Circuit as well. *Shaw v. United States*, 741 F.2d 1202 (9th Cir. 1984); *Yako v. United States*, 891 F.2d 738 (9th Cir. 1989).

Believing it to represent the "majority" view, the Court of Appeals for the Seventh Circuit in this case adopted the view that "punitive damages" for purposes of the Federal Tort Claims Act are those which exceed the amount necessary to compensate the claimant. The court stated:

> Since it is well settled that the purpose of the Act is compensation, the majority of circuits define "punitive damages" under the Act as any damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort. . . . Whether or not an award carries with it the deterrent and punishing attributes typically associated with the word "punitive", to the extent that an award gives more than the actual loss suffered by the claimant it is punitive and nonrecoverable.

Molzof v. United States, 911 F.2d at 20-21, citing *Flannery v. United States*, 718 F.2d at 111.

Relying on this definition of "punitive damages," the appellate court held that Mr. Molzof was not entitled to recover damages for future medical expenses in excess of the amount awarded by the district court, or to recover damages for loss of enjoyment of life, because such damages would not result in compensating Mr. Molzof and were, therefore, punitive.

A. Four Circuits Have Characterized "Punitive Damages" As Those In Excess Of The Amount Necessary To Compensate The Claimant.

Flannery v. United States, 718 F.2d 108, on whose definition of "punitive damages" the appellate court in this case relied, is the leading case which espouses the view that "punitive damages," for purposes of the Federal Tort Claims Act, are those damages which are in excess of the amount necessary to compensate the claimant. In that case, a father brought suit against the government on behalf of his permanently comatose son who was injured in an automobile accident caused by the negligence of a federal employee. The son was awarded damages under West Virginia law for past and future medical expenses, impairment of his future earning capacity, and the loss of his ability to enjoy life. The government appealed, claiming that the award was partly punitive. In a two-to-one decision, the Court of Appeals for the Fourth Circuit held that in a Federal Tort Claims action, a federal court must decide whether damage elements are compensatory or punitive, without regard to their characterization under state law:

> Under 28 U.S.C. §2674 of the Tort Claims Act, damages generally are determinable under state law, for the United States is to be held liable "to the same extent as a private individual

> under like circumstances." But there is a qualification, the relevance and importance of which is now clearly apparent. Punitive damages are not allowable. The Federal Tort Claims Act is a waiver of immunity from suit of the United States, and conditions attached to the waiver must be strictly enforced. The government's immunity is waived insofar as compensatory damages may be determined and awarded. The door for the assertion of private tort claims in federal courts is opened that far, but then the question arises about the allowability of damages treated and labeled under state law as "compensatory" which are in excess of those necessary to provide compensation for injuries and losses actually sustained.
>
> The question of the allowance of such damages is one of federal law. What is compensatory and what is punitive, within the meaning of the statute, is related directly to the extent of the waiver of sovereign immunity. How widely the Congress intended to open the door is not a matter to be resolved under the widely varying laws of the fifty states, but under a uniform standard.

718 F.2d at 110.

The court went on to hold that damages are punitive if they exceed the actual loss sustained by the claimant:

> The FTCA's proscription of awards of punitive damages authorizes only those awards that compensate or reimburse, or provide recompense or redress for injuries suffered by the claimant. To the extent that an award gives more than the actual loss suffered by the claimant, it is "punitive" whether or not it carries with it the deterrent and punishing attributes typically associated with the word "punitive."

718 F.2d at 111.

Applying that test, the *Flannery* court disallowed as punitive the award of damages for loss of enjoyment of

life. The court concluded that the award would not compensate the comatose plaintiff because he could not enjoy the money. The court also held that because earnings are usually taxed, income taxes had to be deducted from the award for loss of future earnings in order to avoid an award of punitive damages. The court also concluded that the award for loss of future earnings had to be reduced by the amount of the award for future medical expenses. The court reasoned that awards to the plaintiff for both future lost earnings and future medical expenses would require the government to pay twice for the plaintiff's living expenses and would, therefore, be punitive.

The *Flannery* court's definition of punitive damages was consistent with that utilized earlier in other courts of appeal. In *Hartz v. United States*, 415 F.2d 259, a woman brought an action for the wrongful death of her husband under a Georgia wrongful death statute which permitted the survivor to recover "the full value of the life of the decedent." The Fifth Circuit held that in awarding damages to the widow for the value of her husband's life, the district court was required to deduct the amount of personal expenses the decedent would have incurred and the taxes he would have paid on his earnings had he lived. The appellate court reasoned that if such an amount were included in the award, the award would be punitive because the widow would not have received that money if the decedent had lived. The appellate court concluded that in a wrongful death action under the Federal Tort Claims Act, a federal court could not award an amount in excess of the loss sustained by the survivor.

In *D'Ambra v. United States*, 481 F.2d 14, the parents of a four-year old boy brought an action for his wrongful death under a Rhode Island statute which provided for recovery by the parents of an amount computed in terms of the economic loss to the decedent's estate. Since that

amount did not bear any relation to the actual loss suffered by the parents, the First Circuit held that a damage award under the statute was punitive and impermissible under the Federal Tort Claims Act.

In *Felder v. United States*, 543 F.2d 657, claims were brought for the wrongful deaths of three people killed in an airplane crash. In awarding damages, the district court deducted from the award an amount equal to the federal and state income taxes the decedents would have had to pay on their future earnings. The Ninth Circuit upheld the deduction, stating:

> To award the full incomes to the survivors without deducting these taxes would be to award them monetary compensation that they could not logically or reasonably have expected to receive had decedents lived.
>
> Since failure to deduct income taxes would result in plaintiffs receiving greater financial support than they would have in the normal course of events, we would consider the effect of such an award to be punitive.

543 F.2d at 669-70.

B. Four Circuits Have Defined "Punitive Damages" In Accordance With Traditional Tort Principles To Mean Those Damages Which Are Intended To Have A Deterrent And Punishing Effect, And One Additional Circuit Has Rejected *Flannery*.

The principle of *Flannery* that "punitive damages" are those which exceed the amount necessary to compensate the claimant, regardless of whether those damages have the deterrent effect normally associated with punitive damages, has been rejected by an increasing number of courts of appeal.

In *Kalavity v. United States*, 584 F.2d 809, an action was brought under Ohio law for the death of a man killed

as a result of the negligence of a government employee. The Sixth Circuit held that the award of damages to the widow could not be reduced on the ground that she had remarried and received support from her new husband. The court found "farfetched" the government's argument that the award did not compensate the plaintiff for an actual loss. 584 F.2d at 811. The court stated that damages are "punitive" only when "awarded separately for the sole purpose of punishing a tortfeasor who inflicted injuries 'maliciously or wantonly, and with circumstances of contumely or indignity.' " 584 F.2d at 811, n. 1, quoting *Milwaukee R.R. v. Arms*, 91 U.S. 489, 493 (1875). The *Kalavity* court reasoned that in enacting the Federal Tort Claims Act, Congress intended to follow traditional tort law concepts when it forbade an award of punitive damages. The court held that the Act's prohibition of punitive damages was only designed to prohibit "use of a retributive theory of punishment against the government, not a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together." 584 F.2d at 811.

Because of its decision in *Felder v. United States*, 543 F.2d 657, which upheld a deduction of income taxes from an award for loss of future earnings, the Ninth Circuit is generally counted among those circuits which view "punitive damages" as any damages in excess of the amount necessary to compensate the claimant. Even the Seventh Circuit Court of Appeals in the instant case placed the Ninth Circuit with those circuits which support that view of punitive damages. See, *Molzof v. United States*, 911 F.2d at 21. However, subsequent to the decision in *Flannery v. United States*, the leading case espousing that view, the Ninth Circuit had an opportunity to follow the *Flannery* approach, and the court flatly rejected it.

In *Shaw v. United States*, 741 F.2d 1202, the district court awarded a brain-damaged child $4.7 million for pecuniary damages and $5 million for non-pecuniary damages, including pain and suffering, mental anguish and destruction of his ability to enjoy life. The government contended that the non-pecuniary damages were punitive because the child's injuries were adequately compensated by the pecuniary award. The Ninth Circuit rejected the government's argument and refused to follow *Flannery*. Referring to *Flannery's* ruling that the award in that case of non-pecuniary damages for loss of enjoyment of life exceeded the comatose plaintiff's actual loss and were thus punitive, the *Shaw* court stated:

> The Ninth Circuit has squarely rejected this analysis, however. In *Felder, supra*, we recognized that such an expansive view of federal law would "impinge seriously upon the architecture of the Act which provides for recovery according to the *lex loci delictus*." 543 F.2d at 675. The unique position of the United States as both defendant and tax-collector justified a rule requiring deduction of taxes from awards for lost compensation. But we also refused to prevent the plaintiffs from recovering a component of non-pecuniary damages already delimited as compensatory under state law. *Id.* The proper approach, we decided, is to hold the loss compensable and to reduce the award if a state court would find it excessive. *Id.* at 674. The Sixth Circuit [in *Kalavity*] also refused to adopt the view that any award of damages in excess of a plaintiff's direct or out-of-pocket loss is punitive.

741 F.2d at 1208.

Accordingly, the court did not label the non-pecuniary award as punitive, but only found it to be excessive, and reduced the award to $1 million.

The Ninth Circuit recently again rejected the *Flannery* analysis. In *Yako v. United States*, 891 F.2d 738, an action for medical malpractice was brought on behalf of a two and one-half year old child who was severely brain damaged. The district court awarded the child substantial damages for loss of earning capacity and damages to cover residential care in a facility for handicapped adults. On appeal, the government relied on the ruling of *Flannery* that awards of future care expenses and future lost earnings are punitive because the government is thereby forced to pay twice for a plaintiff's living expenses. The government contended that the district court's awards for lost earning capacity and residential care expenses were duplicative and hence punitive, because much of the earnings of a healthy, working person are used to provide for his own residential care. The government argued, therefore, that the amount which would normally be spent on residential care should have been subtracted from the total lost earnings figure. The Ninth Circuit disagreed, and once again rejected *Flannery*. Relying upon its decision in *Shaw v. United States*, and upon the fact that state law in Alaska permitted recovery for future medical and maintenance costs and for loss of future earnings, the court held that the district court's award was not clearly erroneous.

Like the Ninth Circuit, the First Circuit has also recently altered its view of what it considers to be "punitive damages." Although in *D'Ambra v. United States*, 481 F.2d 14, the First Circuit seemed to adopt the view that an award is punitive to the extent that it exceeds a plaintiff's direct loss, the court recently rejected the very case in which that view was clearly articulated. In *Reilly v. United States*, 863 F.2d 149 (lst Cir. 1988), the district court awarded damages for, among other things, lost earning capacity and anticipated future care to an infant who

sustained severe, permanent brain damage during her delivery at a naval hospital. In response to the government's contention that the award was punitive, the First Circuit rejected the view of *Flannery v. United States* that awards for future care expenses and loss of future earnings are duplicative and therefore punitive. The court stated: "[W]e find *Flannery* to rest on very shaky underpinnings and decline to adopt it as a model for this circuit." 863 F.2d at 165.

The Second and Eighth Circuits have also rejected the *Flannery* approach.

In *Rufino v. United States*, 829 F.2d 354, a comatose plaintiff sought recovery for, among other things, damages for loss of enjoyment of life. The district court held that an award of such damages was not warranted on the facts, because the plaintiff was in a chronic vegetative state with no cognitive awareness. The Court of Appeals for the Second Circuit reversed the district's judgment insofar as it disallowed any consideration of loss of enjoyment of life. In doing so, the court disagreed with *Flannery's* assessment that damages for loss of enjoyment of life are "punitive," and held that punitive damages are those intended as punishment. The court stated:

> We disagree with, and therefore decline to follow, *Flannery*. We agree with the Sixth Circuit that the FTCA's prohibition of punitive damages was designed to prohibit "use of a retributive theory of punishment against the government." *Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978). Even more directly on point, we agree with the Ninth Circuit's explicit refusal to follow *Flannery*, on the ground that the *Flannery* rule would " 'impinge seriously upon the architecture of the Act which provides for recovery according to the *lex loci delictus*.' " *Shaw v. United States*, 741 F.2d 1202, 1208-09 (9th Cir. 1984) (quoting *Felder v. United States*, 543 F.2d 657, 675 (9th Cir. 1976)).

> The purpose of a recovery for loss of enjoyment of life is clearly to compensate for that loss. The fact that the compensation may inure as a practical matter to third parties in a given case does not transform the nature of the damages. Indeed, such a rule, carried to its logical conclusion, would render all damages recovered by a decedent's estate punitive in nature.

829 F.2d at 362.

In *Manko v. United States*, 830 F.2d 831, a man brought an action for injuries he sustained as a result of receiving a swine flu vaccine. The district awarded damages for, among other things, loss of future earnings. On appeal, the Eighth Circuit rejected the government's argument that the district court's failure to reduce the award for loss of earnings by the amount of the plaintiff's tax liability for those earnings amounted to an award of punitive damages. The court held that "punitive damages" must be viewed as they are under traditional principles of tort law, as damages which are based upon the egregiousness of the tortfeasor's conduct and are intended to punish the tortfeasor. The court stated:

> The Tort Claims Act incorporates, as the substantive standard to be applied, the law of the state in which the tort was committed, in this case Missouri. Under Missouri law, damage awards for lost income are not reduced for taxes. (Citation omitted.) . . . [W]e must therefore apply [that rule] in this Federal Tort Claims Act case unless to do so would amount to an award of "punitive damages" within the meaning of that statute. We agree with the plaintiff that such a holding would "require[] a broad and unprincipled definition of the term 'punitive damages.' " Brief of Appellee/Cross-Appellant 41.
>
> Whether to deduct income taxes is simply one of many issues courts face in deciding what is fair compensation for an injury. Other such

> issues are whether to apply the collateral source rule, whether to award prejudgment interest, how certain a forecast of future earnings must be, how to value pain and suffering, and so forth. Different jurisdictions resolve these issues in different ways, but they have nothing to do with "punitive damages" as that term is traditionally used in the law. They do not depend on a finding of wanton or malicious conduct, they are not imposed to punish a defendant, and they have nothing to do with a defendant's net worth—all questions that customarily arise when punitive damages are sought or awarded. We conclude that Congress did not mean to outlaw all variations from some ideal norm of compensation when it forbade "punitive damages." It was referring only to that concept in its traditional sense. It was not error for the District Court to follow Missouri law on the proper treatment of tax liability on hypothetical lost earnings.

830 F.2d at 836.

C. The Conflict In The Circuits Concerning The Definition Of "Punitive Damages" Needs To Be Resolved.

It is evident from the above discussion that the circuit courts of appeal are fairly evenly divided on the question of what definition is to be given to "punitive damages," as that term is used in 28 U.S.C. §2674. Some courts, most notably *Flannery*, define punitive damages to be any damages in excess of the amount necessary to compensate a plaintiff for his direct loss. Other courts follow a more traditional approach and view punitive damages as being those which are based upon the culpability of the tortfeasor's conduct and are intended as punishment. The decision of the Seventh Circuit in this case was merely a matter of choosing sides. It chose the

Flannery view, which it erroneously believed to be the "majority" view. It held that Mr. Molzof could not recover for any future medical care which would possibly duplicate the care he could receive free of charge at Veterans' Administration facilities, because such a recovery would not compensate him, but only benefit his relatives. The court also held that he could not recover for loss of enjoyment of life because, being comatose, he would not be able to receive any benefit from the money.

Until this Court resolves the question of what Congress meant when it prohibited awards of "punitive damages" in Federal Tort Claims actions under 28 U.S.C. §2674, the courts of appeal around the country will continue to utilize conflicting definitions of "punitive damages" in characterizing elements of state law damages and in deciding which such elements of damage are allowed to be recovered in a Federal Tort Claims action. Review by this Court will resolve the conflict among the circuits and result in the establishment of a uniform definition of "punitive damages" for such actions.

II. THE APPELLATE COURT'S DENIAL OF FULL RECOVERY OF DAMAGES FOR FUTURE MEDICAL EXPENSES TO A VETERAN WITH A SERVICE-CONNECTED DISABILITY IS CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEAL.

Under 38 U.S.C. §610, a veteran with a service-connected disability is entitled to receive free medical care from the Veterans' Administration. Robert Molzof had a service-connected disability. The district court determined that because Mr. Molzof was entitled to receive free medical care from the Veterans' Administration, he was not entitled to recover damages for all future medical expenses. Rather, the court determined that he was only entitled to recover an amount which would pay for

medical care necessary to supplement the care he was receiving at the Veterans' Administration hospital where he was a patient. The district court reasoned that an award of all future medical expenses would result in a double recovery and would have a punitive effect on the government. Accordingly, the district court ordered the government to provide Mr. Molzof with the same level of care he was receiving at the Veterans' Administration hospital, and ordered the government to pay for additional aspects of care--physical therapy, respiratory therapy, and doctor's visits--which Mr. Molzof needed, but which were not being provided at the Veterans' Administration hospital. Relying on the definition of "punitive damages" set forth in *Flannery v. United States*, 718 F.2d at 111, the appellate court concluded that to permit Mr. Molzof to recover an amount for future medical expenses in excess of the amount awarded by the district court would be punitive, and would violate the prohibition against punitive damages set forth in 28 U.S.C. §2674.

The appellate court's ruling is contrary to the result reached by other courts of appeal which have addressed the issue of whether a veteran, who is entitled to receive free medical care at Veterans' Administration facilities, should be awarded damages for future medical expenses in an action under the Federal Tort Claims Act.

A. An Award Of Future Medical Expenses To A Veteran With A Service-Connected Disability Has Not Been Held By Other Courts Of Appeal To Be Punitive.

Prior to the appellate court's decision in this case, two courts of appeal had addressed the issue of whether a veteran, who brings an action under the Federal Tort Claims Act, may be compensated for future medical expenses even though the veteran is entitled to receive free medical care at Veterans' Administration facilities. In

both cases, the courts rejected the argument that an award of future medical expenses would result in a double recovery to the claimant. The courts concluded that no double recovery would occur if the claimant chose not to use the government facilities, and that the claimant should be given an opportunity to make that choice.

In *Feeley v. United States*, 337 F.2d 924 (3rd Cir. 1964), the court stated:

> The district court awarded the plaintiff Twelve Thousand Dollars ($12,000) for future psychiatric medical expenses. 220 F.Supp. at 720. The government argues that this was error because the plaintiff's past practice of employing the free government hospital and medical facilities indicate that he will do so in the future. Therefore, the government will be forced to pay twice for this future care, which it is not required to do under the principles which precluded recovery for the past free hospital care.
>
> However, acceptance of the government's position would result in forcing the plaintiff, financially speaking, to seek only the available public assistance. Private medical care would be obtained at the plaintiff's own expense. We think that this is an unconscionable burden to place on the plaintiff. A victim of another's tort is entitled, we think, to choose, within reasonable limits, his own doctor and place of confinement, if such care is necessary. To force a plaintiff to choose between accepting public aid or bearing the expense of rehabilitation himself is an unreasonable choice. The plaintiff may not be satisfied with the public facilities; he may feel that a particular private physician is superior; in the future because of over-crowded conditions he may not even be able to receive timely care. These are only a few of many considerations with which an individual may be faced in selecting treatment. The plaintiff's past use of the government facilities does not ensure his future use of them. He will now have the funds available to him to enable him to seek private care. He should not be denied this opportunity.
>
> It is true that if the plaintiff should decide to seek care from the Veterans' Administration, the defendant may well be paying twice for the same element of damages. However, this is dependent on whether the government can refuse to render free care. This factor, however, should not be a consideration in awarding damages under the Federal Tort Claims Act, but rather is a policy judgment to be made in the administration of veterans' benefits.

337 F.2d at 934-35.

The Second Circuit Court of Appeals has followed the reasoning of the Third Circuit in *Feeley*. In *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078 (2nd Cir. 1988), the court allowed compensation for future medical expenses, and reversed the decision of the district court which had denied such benefits. In addressing the issue of compensation for future medical expenses where the injured party is entitled to free care in the future, the court stated:

> It should be pointed out that any award for future medical expenses should not be limited on the ground that, as a veteran, plaintiff is entitled to free VA medical care, hospitalization, and institutionalization. He is not obligated to seek medical care from the party whose negligence created his need for such care simply because that party offers it without charge. Moreover, it is not relevant that Ulrich has sought treatment from VA hospitals in the past. He has a right to select a doctor or private hospital of his own choice for his future medical needs. *Feeley v. United States*, 337 F.2d 924, 934-35 (3d Cir. 1964); *Powers [v. United States]*, 589 F.Supp. at 1108-09; *Christopher [v. United States]*, 237 F.Supp. at 798-99. Thus, the district court's failure to award future medical expenses

> was erroneous if and to the extent it relied on the premise that the VA will provide plaintiff free care in the future. That this might result in a windfall for him is a matter for Congress, not the courts.

853 F.2d at 1084.

Neither *Feeley* nor *Ulrich* held that an award of future medical expenses to a veteran who is entitled to receive free medical care is punitive merely because there is a possibility that the veteran will seek the free care and thus receive a windfall from the damage award. The appellate court's conclusion in this case that such an award would be punitive is, therefore, without precedent.

B. The Appellate Court's Refusal To Give Mrs. Molzof An Opportunity To Choose The Facilities Where Mr. Molzof Would Receive Medical Care Is Contrary To The Public Policy Expressed In *Feeley* And *Ulrich*.

Although the appellate court in this case recognized, consistent with *Feeley* and *Ulrich*, that it would be unreasonable to obligate a tort victim to seek continued medical care from the party whose negligence created the need for such care, that is exactly the effect of the appellate court's decision. The court held that Mr. Molzof was not entitled to a full recovery for future medical expenses, because Mrs. Molzof had not sufficiently established that she intended to transfer Mr. Molzof to a private hospital facility. Accordingly, the court affirmed the judgment of the district court which *ordered* the government to provide Mr. Molzof with the same level of care he had been receiving at the Veterans' Administration Hospital in Tomah.

The appellate court essentially held that in order for a veteran to recover future medical expenses in a situation such as this, he or she must conclusively establish

that he or she will seek medical care from private facilities in the future, rather than from a Veterans' Administration facility. However, this holding is directly contrary to the premise of both the *Feeley* and *Ulrich* cases, which is that the plaintiff must be given the *opportunity to choose* between private facilities and Veterans' Administration facilities. Those cases specifically state that the plaintiff should not be *forced* to choose the Veterans' Administration facilities.

The appellate court's determination that Mr. Molzof should be forced to obtain his medical care from the Veterans' Administration because of a lack of proof that medical care would be obtained from private facilities, is also in direct violation of the public policy expressed in *Feeley* and *Ulrich* that a plaintiff should not be forced to obtain medical care from the tortfeasor whose negligence necessitated the medical care.

C. The Possibility Of A Double Recovery Is A Matter For The Legislature, Not The Courts.

The appellate court held that since Mrs. Molzof had not proven that she would transfer her husband to private medical care facilities, any award for future medical expenses greater than that provided by the district court would result in a double recovery. However, the legislative scheme, as it presently exists, permits the possibility of a double recovery. If this possibility is to be eliminated, it is a matter for the legislature, not the courts.

Title 38, U.S.C. §610 provides that a veteran with a service-connected disability is entitled to receive free medical care from the Veterans' Administration. The statute does not provide for a denial of care or for an off-set of the cost of the care in the event that the veteran brings a claim against the government under the Federal Tort Claims Act.

Both *Feeley* and *Ulrich* specifically point out the fact that an award of future medical expenses may result in a double recovery, but they note that such a double recovery is allowed under the legislative scheme, unless Congress acts to amend the law. In *Feeley v. United States*, 337 F.2d at 935, the court stated that the mere fact that the plaintiff may decide to seek future care from the Veterans' Administration "should not be a consideration in awarding damages under the Federal Tort Claims Act, but rather is a policy judgment to be made in the administration of veterans' benefits." Similarly, in *Ulrich v. Veterans Administration Hospital*, 853 F.2d at 1078, the court stated:

> [T]he district court's failure to award future medical expenses was erroneous if and to the extent it relied on the premise that the VA will provide plaintiff free care in the future. That this might result in a windfall for him is a matter for Congress, not the courts.

The *Ulrich* court then cited with approval the case of *Powers v. United States*, 589 F.Supp. 1084, 1109 (D.Conn. 1984), where the district court ruled that future medical expenses were compensable in a situation like this, stating:

> The Court wishes to emphasize, however, that proper Congressional action, such as tying in the set-off provision of 38 U.S.C. §351, infra, to the medical treatment available to veterans under 38 U.S.C. §610 et seq. would eliminate not only the windfall conundrum which confronts and concerns federal courts under these, or similar circumstances, but also protect the federal treasury from the threat of an unnecessary double payment for the same injury.

The appellate court's denial of an award to a veteran for future medical expenses, simply because free medical care is available from the Veterans' Administration, is contrary to the holdings of both *Feeley* and *Ulrich*.

Title 38, U.S.C. §610 must be contrasted with 38 U.S.C. §351, which applies to Federal Tort Claims actions against the government where a veteran is receiving disability benefits. In §351, Congress saw fit to deal with the issue of double compensation for disability benefits. That statute provides that if an individual either receives an award or enters into a settlement in an action under the Federal Tort Claims Act, then disability benefits are to be suspended "until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise." 38 U.S.C. §351. Thus, if a veteran is receiving disability benefits, and he brings a tort action against the government and recovers damages for impairment of earning capacity, the disability benefits are suspended until an equivalent amount has been exhausted from the tort recovery.

Just as in 38 U.S.C. §351, where Congress set out a scheme to preclude the possibility of a double recovery in a Federal Tort Claims action if the veteran is receiving disability benefits, Congress could also have enacted a similar provision to avoid the potential for a double recovery in a Federal Tort Claims action if the veteran is entitled to receive free future medical care under 38 U.S.C. §610. Congress could have either provided for a suspension of the entitlement to free medical care until such time as the fund established pursuant to the award in the Federal Tort Claims action had been depleted, or, in the alternative, Congress could have provided that the Veterans' Administration would provide the care, but then charge the cost of the care back to the veteran. However, Congress did not enact such a provision, and in the absence of such a provision, the appellate court had no right to deny an award of future medical expenses to Mr. Molzof.

CONCLUSION

There is a continuing conflict among the circuit courts of appeal concerning the meaning which is to be given to the term "punitive damages" as it is used in 28 U.S.C. §2674. That conflict needs to be resolved by this Court.

The denial by the appellate court of an award of future medical expenses under the Federal Tort Claims Act to a veteran with a service-connected disability is contrary to the decisions of other courts of appeal which have permitted such an award.

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-2960

SHIRLEY M. MOLZOF, as personal representative of the Estate of ROBERT E. MOLZOF,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District Of Wisconsin.
No. 88-C-904-S – John C. Shabaz, *Judge.*

ARGUED MAY 10, 1990 – DECIDED AUGUST 30, 1990

Before COFFEY and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* Shirley Molzof, as personal representative of the estate of Robert Molzof, appeals from that portion of the judgment of the district court denying her an award under the Federal Tort Claims Act (Act) 28 U.S.C. §§ 2671-2680 for her husband's future medical expenses and for his loss of enjoyment of

life.[1] Because we agree that these damages fall within the scope of the punitive damage exception to the Act's waiver of sovereign immunity, we affirm the district court's denial of this award as non-compensable.

I. BACKGROUND

On October 31, 1986 Robert Molzof underwent surgery at the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin to remove the upper right lobe of his lung. As part of his post-operative care, Molzof was temporarily placed on a ventilator. Thereafter, due to the conceded negligence of hospital employees, the alarm system on his ventilator was disconnected. While so detached, the tube providing life sustaining oxygen was also disconnected. When these disconnections were discovered eight minutes later, Molzof's heart feebly beat at between 30-40 beats per minute and he was not breathing. By the time a physician arrived, Molzof was in complete cardiac arrest. Since he was not resuscitated until nearly a half an hour later, he suffered anoxic encephalopathy. In layman's term, his brain was irreversibly damaged due to oxygen deprivation. This damage left Molzof in a permanent vegetative state requiring a ventilator for breathing and a

[1] Robert Molzof's claim was originally brought by his guardian ad litem Thomas H. Geyer. After the entry of final judgment but before the filing of the notice of appeal, Robert Molzof died. Accordingly, pursuant to Rule 43 of the Federal Rules of Appellate Procedure, the parties filed a stipulation with this court substituting Shirley Molzof as personal representative of the estate of Robert E. Molzof.

nasogastric tube for nutrition and hydration. Responding only to pain and tracheal stimulation, Mr. Molzof was intellectually dead.

Shirley Molzof sued the United States under the Federal Tort Claims Act for the damages she and her husband incurred as a result of its employees' negligence. Since the United States admitted liability, the case proceeded to a bench trial solely on the issue of damages.

After studying Molzof's medical records and considering extensive testimony from three expert medical witnesses which revealed a history of excessive alcohol and tobacco abuse, a diabetic condition, an ongoing inflammation of the liver, a former cancer, a former pancreatic condition, and a pulsating, discolored mass in his right inguinal area, Judge Shabaz predicted the plaintiff's life expectancy to be three years from the date of trial. The court further found that the care currently provided to Molzof free of charge by the Veteran's hospital was reasonable and adequate.[2] In addition, the court concluded that the plaintiff's wife, Shirley, was, with few exceptions, satisfied with those services and had no present intention to transfer him from the Veterans hospital to a private facility. Finally, since there was no indication that the level of care at neighboring hospitals would equal that provided at the Veterans hospital, the court concluded that it was in the plaintiff's best interest to remain at the

[2] Pursuant to 38 U.S.C. § 610 a veteran with a service-connected disability is entitled to receive free medical care from the Veterans Administration. Since Robert Molzof had a service-connected disability the government had a pre-existing duty to provide him with free medical care.

Veterans hospital. Based on these findings, the court ordered the continuation of the same level of care by the Veterans hospital and awarded damages to Robert Molzof in the amount of $75,750 for future medical expenses. This award paid for physical therapy, respiratory therapy and full-time doctor visits deemed necessary to supplement the care he received at the Veterans Hospital. Since Mr. Molzof's chronic comatose condition precluded him from even being cognizant of any damage award, the court denied damages for his loss of enjoyment of life. The plaintiffs appeal seeking damages for Molzof's future medical expenses and his loss of enjoyment of life.[3]

II. DISCUSSION

Prior to the enactment of the Federal Tort Claims Act, the doctrine of sovereign immunity, a shield protecting the government from liability for torts committed by its employees, was abrogable only by a private bill in Congress. *Dalehite v. United States*, 346 U.S. 15, 24-25, 346 S.Ct. 956, 962, 97 L.Ed. 1427 (1953). In 1946, however, "feeling that the Government should assume the obligation to pay damages for the misfeasance of employees carrying out its work," *Id.*, and recognizing the "notoriously clumsy" nature of the private bill device, *Id.*, Congress lowered this shield, and accepted liability as respondeat superior for injuries caused by the negligent or wrongful conduct of its employees. 28 U.S.C. § 1346(b), *Laird v. Nelms*, 406 U.S. 797, 805, 92 S.Ct. 1899, 1903, 32 L.Ed.2d 499 (1972).

[3] Shirley Molzof was awarded $150,000 for past and future loss of consortium. The sufficiency of this amount is not challenged on appeal.

This immunity waiver is not, however, without qualification or exception. While the Act broadly holds the Government liable under state law "to the same extent as a private individual under like circumstances," in the same breath it bars awards of punitive damages. 28 U.S.C. § 2674. Indeed, in a separate section the Act excludes all claims arising from the intentional misconduct of Government employees. 28 U.S.C. § 2680(h). Thus, measuring damages under the Act involves a two-prong process. To ascertain liability and measure damage, a federal court is directed to apply the state law governing the situs of the Government's wrongful act or omission.[4] The court thereafter applies federal law to determine if any part of the award is barred as punitive. *Flannery v. United States*, 718 F.2d 108, 110 (4th Cir. 1983), Comment at 251-52.

A. *Future Medical Expenses*

While the district court determined that Molzof established with sufficient certainty under Wisconsin law his need for future medical care and the cost thereof, it denied as punitive any amount in excess of the $75,750 award supplementing the ordered care provided by the Veterans Hospital. In so ruling, the court reasoned that since there was no showing that a private facility would provide the plaintiff with care of similar or superior quality to that provided by the Veterans Hospital, no indication that a transfer would be in the best interest of

[4] 28 U.S.C. § 1346(b), *See*, Comment, *Defining Punitive Damages Under the Federal Tort Claims Act*, 53 U. Cin. L. Rev. 251 (1984).

the patient, and no expression of dissatisfaction or intention of Mrs. Molzof to transfer her husband to another institution, ordered care at the Veterans Hospital was held to be the only appropriate remedy. Since "[i]t would seem incongruous at first glance that the United States should have to pay in tort for hospital expenses it had already paid," *Brooks v. United States*, 337 U.S. 49, 53, 337 S.Ct. 918, 93 L.Ed. 1200 (1949), the court deemed a monetary award for the value of medical services already provided by the VA at no charge to the plaintiff to be a double recovery whose effect would be punitive. We agree with both this reasoning and result.

Since it is well settled that the purpose of the Act is compensation, the majority of circuits define "punitive damages" under the Act as any damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort. Comment at 258. Whether or not an award carries with it the deterrent and punishing attributes typically associated with the word "punitive", to the extent that an award gives more than the actual loss suffered by the claimant it is punitive and nonrecoverable. *Flannery v. United States*, 718 F.2d 108, 111 (1983). *Accord D'Ambra v. United States*, 481 F.2d 14, 16 (1st Cir.), *Hartz v. United States*, 415 F.2d 259, 260 (5th Cir. 1969); *Felder v. United States*, 543 F.2d 657, 660 (9th Cir. 1976) *but see, Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978); *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078 (2nd Cir. 1988); *Rufino v. United States*, 829 F.2d 354 (2nd Cir. 1987).

This does not mean that any award for future medical expenses is limited because as a veteran the plaintiff is entitled to free medical care and hospitalization. *Ulrich v.*

Veterans Administration Hospital, 853 F.2d 1078, 1084. Indeed, we agree it would be unreasonable to *obligate* a tort victim to seek continued medical care from the very party whose negligence created his need for such care simply because that party offers it without charge. *Id.*

> The plaintiff may not be satisfied with the public facilities; he may feel that a particular physician is superior; in the future because of overcrowded conditions he may not even be able to receive timely care. These are only a few of many considerations with which an individual may be faced in selecting treatment.

Feeley v. United States, 337 F.2d 924, 934 (3rd Cir. 1964).

However, where, as in this case, the court determines that the Veterans facility provides the best level of care, that it is not in the plaintiff's best interest to be moved, that the plaintiff's wife is satisfied with the level of care, that she has no present intention to transfer the plaintiff, and that the plaintiff's short life span minimizes the likelihood of changed circumstances, we believe it is more than reasonable for the court to conclude that a $1.3 million award, sought ostensibly for future medical expenses, would more likely be employed to line the plaintiff's, or, more precisely, his relative's pockets.

B. *Loss of Enjoyment of Life*

While Wisconsin has long permitted the recovery of damages for "*diminished capacity* for enjoying life", *Benson v. Superior Mfg. Co.*, 147 Wis. 20, 132 N.W. 633 (1911), its courts have not indicated whether a comatose plaintiff, with no conscious awareness of his *complete loss* of enjoyment of life, is entitled to recover damages for that loss.

Equally unresolved in this circuit is the issue of whether the Federal Tort Claims Act bars as punitive such an award to a comatose patient because the award could provide him with no cognizable benefit. While we remain unguided as to Wisconsin's probable resolution of its tort law issue, we need not blindly divine their law, for we conclude that even if Wisconsin courts recognized the claim for loss of enjoyment of life, in this case it would be barred as punitive under the Federal Tort Claims Act.

In addition to the difficulty normally associated with the resolution of issues of first impression, our inquiry is made even more trying by the articulation of conflicting viewpoints from our cousins in the Second and Fourth circuits. Based on the minority view "that the FTCA's prohibition of punitive damages was designed to prohibit 'use of a retributive theory of punishment against the government,' " *Rufino v. United States*, 829 F.2d 354, 362 (2nd Cir. 1987), *citing Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978), the Second Circuit awarded damages for loss of enjoyment of life to a comatose plaintiff. In so doing the court noted that despite the absence of conscious awareness, "[t]he purpose of a recovery for loss of enjoyment of life is clearly to compensate for that loss." *Id.* Conversely, based on the prevailing view that damages in excess of those necessary to compensate for "injuries suffered by the claimant" are "punitive" whether or not they carry with them "deterrent and punishing attributes," the Fourth Circuit denied as punitive damages for loss of enjoyment of life to a comatose plaintiff in a condition as lamentable as Mr. Molzof's. *Flannery v. United States*, 718 F.2d 108, 111 (4th Cir. 1983).

While recognizing the plaintiff's grievous loss, the court reasoned that a monetary award to a plaintiff who is conscious of nothing and incapable of enjoying nothing could scarcely compensate him for his loss. Indeed, since the comatose plaintiff could not even experience the pleasure of giving the money away, the court concluded that such an award could only benefit the plaintiff's unscathed relatives.

Since we believe that the Act excludes damages in excess of those necessary to compensate for injuries suffered by the plaintiff and because we are equally confident that an award of damages for loss of enjoyment of life can in no way recompense, reimburse or otherwise redress a comatose patient's uncognizable loss, we adopt the Fourth Circuit's view and deny the award under the circumstances and findings in this case.

III. CONCLUSION

Because we hold that the district court did not commit error in concluding in this case that an additional award of damages for future medical expenses and loss of enjoyment of life were properly characterized as "punitive" and hence barred under the Federal Tort Claims Act, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

ROBERT E. MOLZOF, et al.,

Plaintiffs,

v. Case No. 88 C 904 S

UNITED STATES OF AMERICA,

Defendant.

DAY 3 TRIAL
BEFORE THE HONORABLE JOHN C. SHABAZ
Court Recorder Operator: Mark T. Doerr
Madison, Wisconsin
June 23, 1989
10:30 O'clock A.M. - 12:43 O'clock P.M.

[p. 328] THE COURT: The Court at this time will make its findings of fact and conclusions of law reserving the right to [p. 329] supplement its opinion from the bench where that supplementation may be appropriate. The Court will accept the stipulation entered into between the parties, that stipulation of the uncontested facts which has been set forth in the joint final pretrial

report. Those paragraphs for ready reference in that joint statement of uncontested facts are paragraphs 1 through 26, excluding paragraphs 22 and 23 and are found at pages 1 -- strike that -- 2 through 8 of the final pretrial conference report.

As its next finding, based on the testimony of Drs. Keith Sperling, Harvey M. Golomb and Henry Alba, the plaintiff Robert E. Molzof has a life expectancy of 5 years 8 months. This is a reasonable determination of his life expectancy from November 2 of 1986, and 32 months have passed between that date and the time of trial leaving a life expectancy of 3 years from the present date. In considering this period as the appropriate finding for the plaintiff Robert E. Molzof's life expectancy, the Court considered the testimony of the three expert witnesses, considered the ranges to which each of them testified, considered the medical records summarized in exhibit number 2, the plaintiff's history of excessive alcohol and tobacco abuse, diabetic condition, comatose condition, neurological status, the pulsating mass in his right inguinal area, which is hard and firm which presently is pulsating, discolored and bruised, whether it be an aneurysm, a pseudoaneurysm or a distended [p. 330] graft, the ongoing inflammation of liver, former pancreatic condition, his present age, the possible recurrence of cancer and believes that the life expectancy to be attributed to this plaintiff is substantially less than were these same conditions found in a person of substantially younger years. And accordingly, the Court makes that first appropriate finding in this matter.

The Court also finds that the plaintiff is receiving at the Veterans hospital at Tomah reasonable, necessary and

adequate care. The Court finds that a physician assistant examines the plaintiff once per week. A physician examines the plaintiff once per month. That his vital signs are taken on a daily basis, at least on more than one occasion. That the level of the nursing care is appropriate, necessary and reasonable. That he can remain off of the ventilator for a sufficient period of time for showering. That there are no skin problems or breakdown. That he is provided hand splints on a -- 8 hours per day. That he is not receiving occupational therapy. That physical therapy has been discontinued. That infections are controlled in a closely monitored situation, the infections being substantially less here at Tomah than on the national average. The Court finds that the occupational therapy which has been provided to him with the hand splints is all of that occupational therapy which is necessary. This may be a mixed finding and conclusion of law. It's not meant to be [p. 331] but rather than to revert to each finding and conclude, the Court believes it's appropriate to have a mixture from time to time if that indeed should occur. The Court determines that the physical therapy was discontinued for lack of staffing only and the fact is that the Court also determines that the pulmonary function technician is an individual who needs additional staffing. That the plaintiff is closely supervised, is receiving successful care. That his wife, the co-plaintiff, Shirley M. Molzof is satisfied with those services which have been provided except her concern with the lack of communication with the medical profession concerning her husband. She's concerned with the failure to provide physical therapy and she is concerned with the fact that medical visits are given once per month rather than more often. And

she is, however, appreciative of those efforts provided for the nursing care except for those items to which the Court has previously referred.

The Court further finds that there has not been shown to the satisfaction of this Court the availability of additional places of care. The Court specifically finds that the University Hospital is not available. That St. Lukes is not available. That St. Marys is not available. That Meriter Hospital, I believe formerly known as Madison General may be available but the Court does not believe that the plaintiff has met his burden to the -- by a preponderance of the evidence to demonstrate that that care provided there would be the same or [p. 332] similar to that provided at the Veterans Administration.

The Court further finds that the medical testimony is -- that medical testimony most favorable to the plaintiff would suggest that the plaintiff not be transferred. The Court further finds that there is no present intention upon the part of Mrs. Molzof to transfer her husband to another institution. The Court in its examination of that testimony provided by Mrs. Molzof is of the opinion that except for those three items which the Court has previously articulated, she is well satisfied with the care which her husband has been receiving.

The Court finds that Mrs. Molzof is a caring and concerned loving wife, attentive to her husband's needs as best she is able. That there is at the Veterans Administration Hospital in Tomah a physical therapy staffing shortage, lack of sufficient respiratory therapists and a lack of weekly visits by the doctor. There has been no showing as the Court has previously stated that better

care is available at another institution, that there is a present intent to transfer the plaintiff to another institution and the Court concludes -- prior to doing that, the Court will make an additional finding as to those medical costs which are available to provide similar treatment to the plaintiff at a private institution which the Court at this time finds that such similar treatment has not been satisfactorily demonstrated and then must place an evaluation from that testimony previously offered as to the going rate, if [p. 333] you will, for an institution which could be found to be similar to the Veterans Administration Hospital at Tomah and finds that from its examination of the testimony of Mrs. Rizio and that of Dr. Alba and attempting to equate the services provided at those institutions previously referred to the Court's attention by those witnesses, that the per diem is $915 per day annualized at $333,975. The Court believes that those other expenses of care set forth in the stipulation and the plaintiffs' proposed findings of fact are appropriate if indeed they were warranted. Respiratory therapy, $54,750 which is $50 per visit, 3 visits per day. Physical therapy at $50 per visit, 1 visit per week or $2,600. Occupational therapy at $600 which is $50 per visit, 1 visit per month. Disposable equipment to which there's been a stipulation $37,388.88; medication stipulated $12,229.13 and medical attention $2,340.

The Court then does provide an annualized total of those figures which it has previously found; that total to be announced once the Court totals it once again while making its additional findings in this matter.

The Court finds that the plaintiff Robert Molzof is in a vegetative state and further that prior to the injury

which occurred on November 2 of 1986 the plaintiffs had been married for 37 years. They had an average marriage with the usual trials, tribulations, discords which may be expected in most marriages. There is evidence to indicate they enjoyed one [p. 334] another's company, and the Court will at this time address itself to those conclusions of law which it believes to be appropriate.

As it concerns the medical expenses, the Court first refers to the language in Brooks against the United States, 337 US 49, page 53. "We see no indication that Congress meant the United States to pay twice for the same injury. Certain elements of tort damages may be the equivalent of elements taken into account in providing disability payments. It would seem incongruous at first glance that the United States should have to pay in tort for hospital expenses it had already payed, for example." The Court further addresses that language of Judge Evans in Green against United States, 530 Federal Supplement 633, a 1982 decision at page 644. "However, the question on which Wisconsin law does not control is whether a benefit received from the government is in fact collateral to a Federal Torts Claims Act judgment. To answer that question, one must look to federal law. Courts analyze the questions of whether VA benefits are collateral to a Federal Torts Claims Act judgment by discussing whether the fund from which each is paid is the same. Both are paid out of the general treasury and to allow plaintiff to recover both is to allow a double recovery from the same source." The Court then refers to Feeley against the United States in 337 Federal 2nd 924 at 927 which is the 3rd circuit in 1964. "To allow the plaintiff to recover for [p. 335] this item in his damages would not only result in

a double recovery for him, but also a double payment out of the general treasury by the United States." Plaintiffs' damage award here will not include his expenses incurred at the Veterans Administration. There's not of course that attempt to recover those expenses from the time of the injury to present but the Court believes that that language is appropriate to prospective damages as well where there is no intent whatsoever to use the facility which is presently available.

The Court is well aware of Ulrich and will recall the language in Ulrich against Veterans Administration Hospital at 853 Federal 2nd 1078, the 2nd circuit, 1988. "Ulrich next urges that the district court erred in refusing to award future medical expenses. Why the Court turned down his request from this -- for this item of damages is unclear. The Court first noted, 'That plaintiff will receive medical care, hospitalization and if necessary, institutionalization from Veterans Administration at no charge. Consequently, there will be no award to plaintiff for such services.' Beyond this, the trial court held that the VA's aid and attendance allowance adequately covered the cost of personal home care services recommended by a rehabilitation counselor." The Court concluded that the district court's failure to award future medical expenses was erroneous if and to the extent it relied on the premise that the VA will provide plaintiff free care in the future. The [p. 336] Court believes that, as it said at the conclusion of Mr. Humphrey's motion to dismiss, this indeed was a close question and that there are certain elements here that obviously were not found in Ulrich.

First of all, the Court concludes it's not in the best interest of the plaintiff to move him from the Veterans

Administration facility to those other hospitals which have not shown their availability or qualifications to provide this same high degree of medical care. The Court further finds that by a preponderance of the evidence, there is no intention to have Mr. Molzof moved to another facility. The Court is of the opinion that the care presently provided is adequate, reasonable and necessary which the plaintiff -- with which the plaintiff's spouse is well satisfied and for which, however, she has designated certain concerns which the Court will refer to later in this opinion.

The Court believes that the plaintiff is entitled to adequate, necessary and reasonable hospitalization at the level to which he is presently receiving that hospitalization and that that should continue through the rest of his life. That is appropriate to be provided to him. He should receive that or its equivalent and the Court believes that he is receiving that -- those appropriate medical services or its equivalent except in three areas. Those three areas relate to first of all, physical therapy. The Court believes that in addition to [p. 337] that care which he is presently receiving, he should receive physical therapy at $50 per visit for at least one visit per week, in the amount of $2600. The Court's of the opinion that there is a need for additional respiratory therapy or staffing relating to this concern and that the present provisions should be increased in the amount $18,250 which would be one additional visit per day at $50 per day and that amount of $18,250 is annualized. The Court further believes that additional medical attention would be appropriate and believes that that is an additional amount of $1800. The

court multiplying the $45 per visit by 52 and then subtracting those 12 visits which are presently being provided for an additional of $1800. The Court then determines that the future medical needs or the equivalent thereof which have not been thus far provided and should be provided in the future is $25,250 per year annualized at $75 -- annualized or for the 3 year period $75,750. The Court further believes that from its examination of the Federal Torts Claims Act, not only would the -- an award in addition -- not only would an award greater than that which has been provided for the Court for future medical needs be a double recovery but would be punitive in nature to the defendant wherein the defendant would be providing medical care through the balance of the plaintiff's life and nonetheless making an award for future medical needs which would not be utilized for that care and the Court specifically finds that the dollars would -- by a [p. 338] preponderance of the evidence, that the dollars awarded for future medical needs would not be used for that purpose.

The Court next concerns itself with those findings which are to be necessary concerning the element of loss of enjoyment of life. In his last year before the tragic operation and accident, the plaintiff, Mr. Molzof was in excruciating pain, having received, the Court, his testimony, recalls 497 emergency injections during that last year. The Court determines that the plaintiff, during that period of time, was unable to enjoy those previous pleasures in which he was involved during the preceding years because of that excruciating pain and those illnesses which he had sustained and suffered during that period. The Court examines Flannery or Flannery against

United States, 718 Federal 2nd 108, a 1983 decision, page 111. "There is no doubt that Flannery has lost 'his capacity to enjoy life.' He is conscious of nothing and incapable of enjoying anything. In his condition, he is quite susceptible to infections, but with proper care, he may have a life expectancy of at least as much as 30 years from the date of his injury. There is no likelihood whatever that he will ever become aware of anything. The Supreme Court of Appeals of West Virginia held that as a matter of State law damages for the loss of the capacity to enjoy life were assessable upon an objective basis and it did not matter that this particular plaintiff is unaware of his loss. It is perfectly clear, however that an award of [p. 339] $1,300,000 for the loss of enjoyment of life cannot provide him with any consolation or ease any burden resting upon him. It provides -- he cannot spend it upon necessities of [sic] pleasures. He cannot use the $1.3 million. He cannot experience the pleasure of giving it away. If paid, the money would be invested and the income accumulated until Flannery's death, when it would be distributed to those surviving relatives of his entitled to inherit from him. If it is compensatory in part to anyone, it is compensatory to those relatives who will survive him. Since the award of $1.3 million can provide Flannery with no direct benefit, the award is punitive and not available under the Federal Torts Claims Act."

Judge Mimm, in his assessment of Nemmers cites Flannery in Nemmers against United States, 681 Federal Supplement 567, the Central District of Illinois, a 1988 case, in which he recites Flannery, discusses the same concerns in Flannery that we have in the Nemmers case and this case and quotes 28 USC section 2674 of the tort

claims act: "Damages generally are determinable under State law for the United States is to be held liable to the same extent as a private individual under like circumstances. But there is a qualification, the relevance and importance of which is now clearly apparent. Punitive damages are not allowable. The Federal Torts Claims Act is a waiver of immunity from suit of the United States and conditions attached as to the waiver must be strictly enforced." And the Court in [p. 340] Nemmers discusses the same concerns that Judge Hainsworth discussed in Flannery and the Court has those same concerns.

The Court has carefully examined the instructions and the law concerning past and future disability which is our Wisconsin civil jury instruction 1750. "You will answer this question by inserting such a sum of money as you are satisfied will fairly and reasonably compensate the plaintiff for such impairment of his health, physical abilities and bodily functions as you are satisfied he has suffered to date and is reasonably certain to suffer in the future as a consequence of his injuries. In arriving at your answer to this question, you will consider what extent his injuries have impaired and will impair his ability to enjoy the normal activities, pleasures and benefits of life."

The Court notes that in Nemmers, Judge Mimm was faced with essentially the same problem that this Court is facing as to whether or not the State law should prevail and this Court is of the opinion as is the Flannery Court and the Nemmers Court that the dollars which would be awarded this plaintiff for loss of the enjoyment of life would indeed be not in any way compensatory to him. And if they are not compensatory, the Court is of the opinion that they are punitive in nature and may not be

awarded. The Court will find that from its assessment of those -- of that limited loss of enjoyment of life, referring it to the previous year in which he found himself to being less than [p. 341] satisfied with life's surroundings, that the award would be minimal, would not approach of course the $1.3 million which they were discussing in Flannery, but would be in the amount, and the Court will make the finding that the amount for loss of enjoyment of life would have been in the amount $75,000 which amount is not provided under those decisions previously suggested.

The Court yesterday, in referring to its notes, granted the motion to dismiss as it relates to the claim of shortened life expectancy. The Court believes that it should make a more appropriate articulation of its reasons, particularly as a result of its inability to read the notes which it had taken of the cases when anticipating that the motion would be made at the end of trial rather than at the conclusion of the plaintiffs' case. DePass against United States which Judge Posner writes was not only dicta but was in a dissent as well. The Court at one time said dicta, then it said dissent and then it went back and reexamined the case at 721 Federal 2nd 203, a 7th circuit 1983 decision in which he did state at page 208 in his dissent, "Although few reported cases deal with the specific question whether a reduction in life expectancy is compensable, the trend is toward allowing recovery in such cases." The Court does not find that trend to have occurred in Wisconsin and is more convinced by the language in Kwasny against United States, 823 Federal 2nd 194, a 7th circuit opinion, 1987 which [p. 342] is

written by Judge Posner in which he then writes: "Illinois, whose substantive law governs this case, does not permit recovery in a wrongful death suit of the loss of utility to the decedent from having his life cut short. The only thing that you can -- the only thing that can be recovered is the pecuniary loss to the survivors. It is true that the decedent's own suit for personal injury survives his death, but such is suit at least as conventionally conceived is a suit for the loss sustained by him during his lifetime and not for the loss of utility from dying prematurely. The qualification is important." And the Court then reexamined the wrongful death statute in Wisconsin in which it clumsily analogized the Kwasny decision to chapter 895 of the Wisconsin Statutes and refers now to 895.04 -- plaintiff in wrongful death actions (4). "Judgment for damages for pecuniary injury from wrongful death may be awarded to any person entitled to bring a wrongful death action." This is for a pecuniary injury; does not extend to those years beyond death except for those statutory concerns such as loss of earning capacity, which we don't have here. And for those specific items which are capped to include loss of consortium which is capped at $50,000 in that provision. But this Court would specifically liken this case as to a -- as it relates to those years after death as a belated wrongful death caused by the plaintiff for those years after the -- for those additional years which could have been assumed would have [p. 343] been lived by this plaintiff, had the accident not occurred. And I don't find the trend and neither does Judge Posner in his subsequent comments in Kwasny.

The Court then has before it the claim of the plaintiff, Shirley Molzof, which is for the loss of companionship, the loss of her husband's limited services, the loss of the love and affection and she has suffered a loss of society and the companionship of her husband as a result of the negligence of employees of the United States and has incurred and will incur damages for loss of that society and companionship of $150,000 for which judgment will be entered in her favor against the United States in this matter.

MR. ROTTIER: Judge, I didn't catch the numbers. 115 or 150?

THE COURT: 150. 50. 1-5-0. The Court now takes a moment to gather together its notes to address those items which, in this wealth of materials and law books, may have escaped its observation before adjourning. I regret that it's taken this period of time to find the one item that I wish to place in the record prior to our adjournment. It will be a part of the order which I will have entered in this matter. It will be a brief supplementation to those remarks which the Court has made and at this time the Court will order that judgment be entered in favor of the plaintiff, Robert E. Molzof by his guardian ad litem, Thomas H. Geyer for those specific [p. 344] items of damages previously articulated for physical therapy, respiratory therapy and full-time doctor visits in the amount of $75,750 and for an award of reasonable, necessary and adequate hospitalization during his lifetime from the Veterans Administration, those amounts previously suggested by the Court or ordered by the Court to augment those reasonable services which are presently being provided. And further that judgment be entered in favor of

the plaintiff, Shirley M. Molzof against the defendant, United States of America, in the amount of $150,000 together with costs in each instance. Is there anything further to bring before the Court at this time by the plaintiffs?

MR. ROTTIER: The only item that crossed my mind, Judge, is whether you prefer at this time to make a finding regarding whether or not there was a shortened life expectancy in spite of your legal ruling regarding lack of recoverability.

THE COURT: I haven't considered that in the alternate and have not designated that particular period. It may very well be that when I supplement that, I'll take that concern that you have expressed under advisement and when I issue the order for judgment, may very well include that if indeed I believe it to be appropriate to do so.

MR. ROTTIER: And if I may address one question to the Court. Am I to understand that the portion of the judgment mandating reasonable, necessary and adequate care at current [p. 345] levels is essentially to have the same effect as a permanent injunction requiring those, enforceable in the event they are not met?

THE COURT: This Court has continuing jurisdiction of a matter of this nature and I plan to have that enforced whenever it has been brought to my attention that there has been a failure to do so.

MR. ROTTIER: Those are the only matters I had in mind.

THE COURT: Mr. Humphrey?

MR. HUMPHREY: Nothing from the government, Your Honor.

THE COURT: Alright I wish to thank counsel and your witnesses for their concise and informative presentations and we are adjourned.

RECORDER: All rise. This honorable Court now stands adjourned.

(12:43 P.M.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT E. MOLZOF, by
his Guardian ad Litem,
Thomas H. Geyer, and
SHIRLEY M. MOLZOF,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM
AND ORDER

88-C-904-S

Trial to the Court was held in the above entitled matter on and between June 21 and June 23, 1989, the plaintiffs having appeared by Habush, Habush & Davis, by Daniel A. Rottier, and the plaintiff Robert E. Molzof by his Guardian ad Litem, Thomas H. Geyer; the defendant by Patrick J. Fiedler, United States Attorney, by Richard D. Humphrey. The Hon. John C. Shabaz, District Judge, presided.

Upon all of the evidence received, the stipulation entered into between the parties, and the facts as found by the Court which were stated from the bench it is concluded that the plaintiff Robert E. Molzof is presently receiving reasonable, adequate and necessary hospitalization and medical care from the Veterans Administration Hospital, Tomah, Wisconsin, except for physical therapy, the additional availability of a pulmonary function technician (respiratory therapy) and weekly visits from a

physician, for which items adequate monetary compensation will be provided.

No justification has been presented by a preponderance of the evidence for any greater amount of compensation for plaintiff's subsequent medical needs. The reasonable, adequate, and necessary care provided Robert E. Molzof has not been found to be equaled by the alternative private care facilities proposed. Nor have they been found to be readily available. Finally, the speculative nature of the testimony referring to alternative care facilities manifests no present intention whatsoever that were funds available the private care alternatives would be utilized by the plaintiff Robert E. Molzof.

Accordingly, the plaintiff is entitled to future reasonable, necessary and adequate medical care, to include full hospitalization for the remainder of his life, from the defendant United States of America at a Veterans Administration hospital, together with $17,800.00 for physical therapy, $54,700.00 for respiratory therapy, and $5,400.00 for weekly physican's visits; in all, the sum of $67,950.00.

Any amount for medical care in excess of this award would be punitive in nature to the defendant, resulting in double recovery. The defendant would provide the same high degree of medical care and hospitalization in addition to a monetary award for alternate medical care which would not be utilized.

Further, no authority exists for those damages requested for plaintiff's five-year shortened life expectancy.

Finally, an award for lost enjoyment of life is not provided in these circumstances by federal law. The vegetative state of the plaintiff Robert E. Molzof and his complete inability to enjoy the remainder of his life would not be enhanced in any way by such an award which the Court had previously determined to be no more than $60,000.00. His enjoyment of life at the time of the accident had been severely hampered by excruciating pain and debilitating illness. Although such an amount may be appropriately awarded under Wisconsin law, it is determined by the Federal Tort Claims Act to be punitive in nature. Plaintiff Robert E. Molzof's full medical needs have been provided in an attempt to sustain his limited period of life. To provide any sum in addition thereto would be of no benefit whatsoever to the plaintiff Robert E. Molzof, but instead an accumulation for his estate.

There is further awarded to the plaintiff Shirley M. Molzof the amount of $150,000.00 for the loss of society and the companionship of her husband, Robert E. Molzof, the Court having considered her age and health, the love and affection afforded, and the society and companionship extended and rendered, as well as the conduct of the plaintiffs towards each other, and the plaintiff Shirley M. Molzof's loss for the deprivation of that society and companionship.

Accordingly,

ORDER

IT IS ORDERED that judgment be entered in favor of the plaintiff Robert E. Molzoff [sic] against the defendant United States of America in the amount of $67,950.00 plus

costs, and that said defendant provide said plaintiff with reasonable, adequate and necessary medical care, to include hospitalization for the remainder of his life at Veterans Administration facilities.

IT IS FURTHER ORDERED that judgment be entered in favor of the plaintiff Shirley M. Molzof against the defendant United States of America in the amount of $150,000.00 plus costs.

Entered this 12th day of July, 1989.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

JUDGMENT IN A CIVIL CASE

United States District Court	)	DISTRICT Western District of Wisconsin
CASE TITLE Robert E. Molzof, et al., Plaintiffs, V. United States of America, Defendant.	)	DOCKET NUMBER 88-C-904-S
	)	NAME OF JUDGE OR MAGISTRATE John C. Shabaz

[ ] **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial before the Court with the judge named above presiding. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is entered in favor of the plaintiff Robert E. Molzoff [sic] against the defendant Untied [sic] States of America in the amount of $67,950.00 plus costs, and that said defendant provide said plaintiff with reasonable, adequate and necessary medical care, to include hospitalization for the remainder of his life at Veterans Administration facilities.

It Is Further Ordered and Adjudged that judgment is entered in favor of the plaintiff Shirley M. Molzof against the defendant United States of America in the amount of $150,000.00 plus costs.

CLERK

illegible

(BY)DEPUTY CLERK

DATE

July 12, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ROBERT E. MOLZOF, by his Guardian ad Litem, Thomas H. Geyer, and SHIRLEY M. MOLZOF,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CORRECTED MEMORANDUM

88-C-904-S

IT IS ORDERED that the memorandum issued on July 12, 1989 in the above entitled case be corrected as follows:

Paragraph 2 on page 2 should be corrected as follows:

> Accordingly, the plaintiff is entitled to future reasonable, necessary and adequate medical care, to include full hospitalization for the remainder of his life, from the defendant United States of America at a Veterans Administration hospital, together with *$7,800.00 for physical therapy ($2,600.00 per year for 3 years); $54,750.00 for respiratory therapy ($18,250.00 per year for 3 years); and $5,400.00 for weekly physician's visits ($1,800.00 per year for 3 years)*; in all the sum of $67,950.00.

Judgment need not be amended.

Entered this 15th day of August, 1989.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

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38 U.S.C. § 610

§ 610. Eligibility for hospital, nursing home, and domiciliary care

(a)(1) The Administrator shall furnish hospital care, and may furnish nursing home care, which the Administrator determines is needed –

(A) to any veteran for a service-connected disability;

(B) to a veteran whose discharge or release from the active military, naval, or air service was for a disability incurred or aggravated in line of duty, for any disability;

(C) to a veteran who is in receipt of, or who, but for a suspension pursuant to section 351 of this title (or both such a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such veteran's continuing eligibility for such care is provided for in the judgment or settlement described in such section, for any disability;

(D) to a veteran who has a service-connected disability rated at 50 percent or more, for any disability;

(E) to any other veteran who has a service-connected disability, for any disability;

(F) to a veteran who is a former prisoner of war, for any disability;

(G) to a veteran exposed to a toxic substance or radiation, as provided in subsection (e) of this section;

(H) to a veteran of the Spanish-American War, the Mexican border period, or World War I, for any disability; and

(I) to a veteran for a non-service-connected disability, if the veteran is unable to defray the expenses of necessary care as determined under section 622(a)(1) of this title.

(2)(A) To the extent that resources and facilities are available, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to a veteran for a non-service-connected disability if the veteran has an income level described in section 622(a)(2) of this title.

(B) In the case of a veteran who is not described in paragraph (1) of this subsection or in subparagraph (A) of this paragraph, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to the veteran for a non-service-connected disability –

(i) to the extent that resources and facilities are otherwise available; and

(ii) subject to the provisions of subsection (f) of this section.

(3) In addition to furnishing hospital care and nursing home care described in paragraphs (1) and (2) of this subsection through Veterans' Administration facilities, the Administrator may furnish such hospital care in accordance with section 603 of this title and may furnish such nursing home care as authorized under section 620 of this title.

(b)(1) The Administrator may furnish to a veteran described in paragraph (2) of this subsection such domiciliary care as the Administrator determines is needed for the purpose of the furnishing of medical services to the veteran.

(2) This subsection applies in the case of the following veterans:

(A) Any veteran whose annual income (as determined under section 503 of this title) does not exceed the maximum annual rate of pension that would be applicable to the veteran if the veteran were eligible for pension under section 521(d) of this title.

(B) Any veteran who the Administrator determines has no adequate means of support.

(c) While any veteran is receiving hospital care or nursing home care in any Veterans' Administration facility, the Administrator may, within the limits of Veterans' Administration facilities, furnish medical services to correct or treat any non-service-connected disability of such veteran, in addition to treatment incident to the disability for which such veteran is hospitalized, if the veteran is willing, and the Administrator finds such services to be reasonably necessary to protect the health of such veteran. The Administrator may furnish dental services and treatment, and related dental appliances, under this subsection for a non-service-connected dental condition or disability of a veteran only (1) to the extent that the Administrator determines that the dental facilities of the Veterans' Administration to be used to furnish such services, treatment, or appliances are not needed to furnish services, treatment, or appliances for dental conditions or disabilities described in section 612(b) of this title, or (2) if (A) such non-service-connected dental condition or disability is associated with or aggravating a disability for which such veteran is receiving hospital care, or (B) a compelling medical reason or a dental emergency requires furnishing dental services, treatment, or

appliances (excluding the furnishing of such services, treatment, or appliances of a routine nature) to such veteran during the period of hospitalization under this section.

(d) In no case may nursing home care be furnished in a hospital not under the direct jurisdiction of the Administrator except as provided in section 620 of this title.

(e)(1)(A) Subject to paragraphs (2) and (3) of this subsection, a veteran –

(i) who served on active duty in the Republic of Vietnam during the Vietnam era, and

(ii) who the Administrator finds may have been exposed during such service to dioxin or was exposed during such service to a toxic substance found in a herbicide or defoliant used in connection with military purposes during such era, is eligible for hospital care and nursing home care under subsection (a)(1)(G)

of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(B) Subject to paragraphs (2) and (3) of this subsection, a veteran who the Administrator finds was exposed while serving on active duty to ionizing radiation from the detonation of a nuclear device in connection with such veteran's participation in the test of such a device or with the American occupation of Hiroshima and Nagasaki, Japan, during the period beginning on September 11, 1945, and ending on July 1, 1946, is eligible for hospital care and nursing home care under subsection

(a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(2) Hospital and nursing home care may not be provided under subsection (a)(1)(G) of this section with respect to a disability that is found, in accordance with guidelines issued by the Chief Medical Director, to have resulted from a cause other than an exposure described in subparagraph (A) or (B) of paragraph (1) of this subsection.

(3) Hospital and nursing home care and medical services may not be provided under or by virtue of subsection (a)(1)(G) of this section after December 31, 1990.

(f)(1) The Administrator may not furnish hospital care or nursing home care under this section to a veteran who is eligible for such care by reason of subsection (a)(2)(B) of this section unless the veteran agrees to pay to the United States the applicable amount determined under paragraph (2) of this subsection.

(2) A veteran who is furnished hospital care or nursing home care under this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such care shall be liable to the United States for an amount equal to the lesser of –

> **(A)** the cost of furnishing such care, as determined by the Administrator; and
>
> **(B)** the amount determined under paragraph (3) of this subsection.

(3)(A) In the case of hospital care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is –

> **(i)** the amount of the inpatient Medicare deductible, plus
>
> **(ii)** one-half of such amount for each 90 days of care (or fraction thereof) after the first 90 days of such care during such 365-day period.

(B) In the case of nursing home care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is the amount of the inpatient Medicare deductible for each 90 days of such care (or fraction thereof) during such 365-day period.

(C)(i) Except as provided in clause (ii) of this subparagraph, in the case of a veteran who is admitted for nursing home care under this section after being furnished, during the preceding 365-day period, hospital care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of hospital care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such nursing home care until –

> **(I)** the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or
>
> **(II)** the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(ii) In the case of a veteran who is admitted for nursing home care under this section after being furnished, during any 365-day period, hospital care for which the veteran has paid an amount under subparagraph (A)(ii) of this paragraph and who has not been furnished 90 days of hospital care in connection with such payment, the amount of the liability of the veteran under paragraph (2) of this subsection with respect to the number of days of such nursing home care which, when added to the number of days of such hospital care, is 90 or less, is the difference between the inpatient Medicare deductible and the amount paid under such subparagraph until –

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(D) In the case of a veteran who is admitted for hospital care under this section after having been furnished, during the preceding 365-day period, nursing home care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of nursing home care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such hospital care until –

(i) the veteran has been furnished, beginning with the first day of such nursing home care furnished in connection with such payment, a total of 90 days of nursing home care and hospital care; or

(ii) the end of the 365-day period applicable to the nursing home care for which payment was made,

whichever occurs first.

(E) A veteran may not be required to make a payment under this subsection for hospital care or nursing home care furnished under this section during any 90-day period in which the veteran is furnished medical services under section 612(f) of this title to the extent that such payment would cause the total amount paid by the veteran under this subsection for hospital care and nursing home care furnished during that period and under section 612(f)(4) of this title for medical services furnished during that period to exceed the amount of the inpatient Medicare deductible in effect on the first day of such period.

(F) A veteran may not be required to make a payment under this subsection or section 612(f) of this title for any days of care in excess of 360 days of care during any 365-calendar-day period.

(4) Amounts collected or received on behalf of the United States under this subsection shall be deposited in the Treasury as miscellaneous receipts.

(5) For the purposes of this subsection, the term "inpatient Medicare deductible" means the amount of the inpatient hospital deductible in effect under section 1813(b) of the Social Security Act (42 U.S.C. 1395e(b) on

the first day of the 365-day period applicable under paragraph (3) of this subsection.

(g) Nothing in this section requires the Administrator to furnish care to a veteran to whom another agency of Federal, State, or local government has a duty under law to provide care in an institution of such government.

(2)

No. 90-838

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHIRLEY M. MOLZOF, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT E. MOLZOF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a permanently and totally comatose plaintiff may recover damages under the Federal Tort Claims Act for loss of the ability to enjoy life.

2. Whether a plaintiff receiving free medical care from the Veterans Administration is entitled to recover damages for future medical expenses in a Federal Tort Claims Act suit, beyond the amount awarded to supplement his care at a Veterans Administration hospital, even though the record indicated that he would not seek medical care from private sources in the future.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 911 F.2d 18. The memorandum and order of the district court (Pet. App. 26-29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1990. The petition for a writ of certiorari was filed on November 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Shirley Molzof is the personal representative of the estate of Robert E. Molzof, her husband.

Robert Molzof was a veteran suffering from a service-connected disability and, accordingly, was entitled to receive free medical care from the Veterans Administration pursuant to 38 U.S.C. 610. Pet. App. 3 n.2. On October 31, 1986, he underwent lung surgery at the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin. Following the surgery, Robert Molzof was temporarily placed on a ventilator. The ventilator's alarm system became disconnected and, while the alarm system was not functioning, the ventilator tube itself became disconnected, causing an interruption in his supply of oxygen. As a result, Robert Molzof sustained irreversible neurological damage, leaving him permanently and totally comatose. *Id.* at 2. He continued to receive care at the VA Hospital in Tomah, Wisconsin. *Id.* at 26.

2. Robert Molzof's guardian ad litem filed suit on his behalf under the Federal Tort Claims Act (FTCA) in the United States District Court for the Western District of Wisconsin. The United States admitted liability and, after a trial on the issue of damages, the district court awarded Robert Molzof $67,950 for future medical services to supplement the care provided by the VA hospital in three respects: (1) physical therapy sessions; (2) respiratory therapy; and (3) weekly visits by a physician. Pet. App. 4, 27, 32.[1] The district court declined to award requested damages for other future medical expenses. It determined that the free care being provided to Robert Molzof by the VA was reasonable and adequate, that Shirley Molzof was largely satisfied with that care and had no present intention to transfer Robert Molzof to a private facility, and that,

[1] The district court's memorandum and order awarded Robert Molzof $67,950 for future medical expenses (Pet. App. 27, 29, 32); at a hearing, however, the district court had stated that it would award $75,750 (*id.* at 23), and the court of appeals referred to that amount (*id.* at 4).

according to the record, neighboring private hospitals could not provide a comparable level of care. *Id.* at 3, 12-13, 27. The court noted that awarding a higher amount would result in double recovery and would be punitive. *Id.* at 27.[2] The court then declined to award Robert Molzof damages for loss of enjoyment of life, reasoning that his condition precluded him even from being aware of such an award or from benefiting from it and that such damages would therefore also be punitive in nature. *Id.* at 4, 28.[3]

After entry of the district court's final judgment, Robert Molzof died; Shirley Molzof, as personal representative of the estate, was substituted as plaintiff. Pet. App. 2 n.1.

3. The court of appeals affirmed. Pet. App. 1-9. Noting the district court's findings regarding the lack of availability of comparable medical care at private medical facilities and the evidence that Robert Molzof would not be transferred to a private facility, the court of appeals agreed with the district court that an award of additional damages for future medical expenses would result in double payment by the government for medical expenses. Pet. App. 5-6. Adopting the approach of the Fourth Circuit in *Flannery* v. *United States*, 718 F.2d 108, 111 (1983), cert. denied, 467 U.S. 1226 (1984), and of "the majority of circuits," the court of appeals reasoned that an award is "punitive" under the FTCA to the extent that it provides "more than the actual loss suffered by the claimant." Pet. App. 6. Accordingly, the court concluded that an additional award to Robert Molzof for

[2] The recovery of "punitive damages" is not permitted under the FTCA. 28 U.S.C. 2674.

[3] Shirley Molzof had also filed suit under the FTCA on her own behalf, and she received $150,000 for past and future loss of consortium. Pet. App. 4, 28.

the expenses of future medical care would violate the FTCA's proscription against punitive damages. The court emphasized that it was not formulating a broad rule limiting future medical expenses for any veteran entitled to free medical care (*ibid.*); rather, it was relying on the district court's factual determinations "that the Veterans facility provides the best level of care, that it is not in the plaintiff's best interest to be moved, that the plaintiff's wife is satisfied with the level of care, that she has no present intention to transfer the plaintiff, and that the plaintiff's short life span minimizes the likelihood of changed circumstances." *Id.* at 7.

With regard to damages for loss of enjoyment of life, the court of appeals pointed out that Wisconsin courts had not decided "whether a comatose plaintiff, with no conscious awareness of his *complete loss* of enjoyment of life, is entitled to recover damages for that loss." Pet. App. 7. The court determined, however, that it was unnecessary to predict whether such damages would be recoverable under state law because those damages would, in any event, be barred as punitive under the FTCA. *Id.* at 8. Acknowledging that the Second Circuit had reached a different result in *Rufino* v. *United States*, 829 F.2d 354 (1987), the court agreed with the Fourth Circuit in *Flannery* v. *United States*, *supra*, that damages to a comatose plaintiff for loss of enjoyment of life are necessarily punitive because they cannot realistically be viewed as compensatory to such an individual. Pet. App. 8-9. Concluding that "an award of damages for loss of enjoyment of life can in no way recompense, reimburse or otherwise redress a comatose patient's uncognizable loss," the court denied such an award "under the circumstances and findings in this case." *Id.* at 9.

ARGUMENT

As the court of appeals pointed out (Pet. App. 6), various courts of appeals have suggested differing interpretations

of the meaning of the term "punitive damages" in the FTCA.[4] We do not believe, however, that this case is a suitable vehicle for resolution of these differences, or that the actual issues presented are as sweeping as petitioner suggests. In this case, the court of appeals affirmed the district court's decision that two particular items of damages should not be permitted: (1) damages to a comatose patient for loss of enjoyment of life and (2) additional future medical expenses. Those specific issues do not warrant review. The issue of loss of enjoyment of life for a comatose person arises infrequently, and, at present, there is no jurisdiction in which such an award would clearly be available under the FTCA. With respect to the lower courts' second determination – that no further award for future medical expenses is appropriate in this case – that determination is reasonable and case-specific. Accordingly, review is not warranted.

1. The court of appeals concluded that Robert Molzof's permanently comatose condition foreclosed any possibility that an award for loss of enjoyment of life could compensate him for his actual loss and that such an award therefore was punitive within the meaning of 28 U.S.C. 2674. The issue presented can be appropriately viewed as the narrow question whether a permanently and totally comatose plaintiff may recover damages under the Act for loss of enjoyment of life.

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[4] Compare, *e.g.*, *Flannery* v. *United States*, 718 F.2d at 111 ("To the extent that an award gives more than the actual loss suffered by the claimant, it is 'punitive' whether or not it carries with it the deterrent and punishing attributes typically associated with the word 'punitive.'"), with *Rufino* v. *United States*, 829 F.2d at 362 ("We disagree with, and therefore decline to follow, *Flannery*. We agree with the Sixth Circuit that the FTCA's prohibition of punitive damages was designed to prohibit 'use of a retributive theory of punishment against the government.'").

Only two other courts of appeals have considered this specific issue.[5] In *Flannery* v. *United States*, *supra*, on which the court of appeals here relied, the Fourth Circuit initially certified to the West Virginia Supreme Court the question whether damages for loss of capacity to enjoy life were recoverable under state law notwithstanding the fact that the permanently comatose plaintiff in that case had no awareness of his loss.[6] Following an affirmative response by the state court, the Fourth Circuit determined that such damages were barred by the FTCA's prohibition against punitive damages (28 U.S.C. 2674) because they would be of no direct benefit to the plaintiff. 718 F.2d at 111.

The Second Circuit reached a different conclusion in *Rufino* v. *United States*, *supra*. There the court of appeals recognized that New York appellate courts had not yet deter-

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[5] None of the other cases cited by petitioner concerns such damages. See *Hartz* v. *United States*, 415 F.2d 259 (5th Cir. 1969) (wrongful death); *D'Ambra* v. *United States*, 481 F.2d 14 (1st Cir.) (same), cert. denied, 414 U.S. 1075 (1973); *Felder* v. *United States*, 543 F.2d 657 (9th Cir. 1976) (same); *Kalavity* v. *United States*, 584 F.2d 809 (6th Cir. 1978) (same); *Shaw* v. *United States*, 741 F.2d 1202 (9th Cir. 1984) (severe mental and physical retardation caused by birth trauma); *Reilly* v. *United States*, 863 F.2d 149 (1st Cir. 1988) (same); *Yako* v. *United States*, 891 F.2d 738 (9th Cir. 1989) (severe brain damage resulting in partial blindness and deafness and permanent mental retardation caused by undiagnosed meningitis); *Manko* v. *United States*, 830 F.2d 831 (8th Cir. 1987) (partial paralysis caused by swine flu vaccination). The importance of the specific context of particular damages claims is underscored by the fact that petitioner counts two circuits (the First and the Ninth) on *both* sides of the general punitive damages issue. See Pet. 14-15, 16-19. A number of these cases, moreover, focus on the propriety of a deduction from a damages award for income taxes that would have been paid by the victim. See, *e.g.*, *Felder*, 543 F.2d at 665-671.

[6] The FTCA incorporates state law as the substantive standard of federal liability for the negligence of federal employees. 28 U.S.C. 1346(b).

mined whether cognitive awareness was a necessary condition under state law to an award of civil tort damages for loss of enjoyment of life. The Second Circuit predicted, however, that New York courts would ultimately hold that a plaintiff need not be consciously aware to recover such damages. 829 F.2d at 359-362 The Second Circuit went on to determine that 28 U.S.C. 2674 posed no obstacle to such recovery. Rejecting the Fourth Circuit's approach in *Flannery*, the court held that damages are punitive only if based on a retributive theory. Concluding that damages for loss of enjoyment of life have a compensatory purpose, the court ruled that they can be awarded under the FTCA even to a comatose plaintiff. 829 F.2d at 362.

The Second Circuit's prediction in *Rufino* regarding New York law proved to be wrong, however. The New York Court of Appeals subsequently held that state law permitted recovery of civil tort damages for loss of enjoyment of life only where the plaintiff retained "some level of awareness." *McDougald* v. *Garber*, 538 N.Y.S.2d 937, 940, 536 N.E. 2d 372, 375, 73 N.Y. 2d 246, 253 (1989). The state court concluded that an award of money damages for loss of enjoyment of life to a totally comatose plaintiff "has no meaning or utility to the injured person" and, accordingly, serves no compensatory purpose. *Ibid.*

In light of the New York court's decision in *McDougald*, the theoretical conflict between *Flannery* and *Rufino* may have no practical consequence. Potential plaintiffs in the factual circumstances of Robert Molzof would now be precluded from recovering such damages in an FTCA action arising either in West Virginia (and other states in the Fourth Circuit) or in New York, albeit for different reasons.[7] The same result obviously applies under the Seventh Circuit's decision in this case.

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[7] We have found no decision in the other States in the Second Circuit permitting such damages to be awarded.

Moreover, it is by no means clear that Robert Molzof would be entitled to recover damages for loss of enjoyment of life even if this Court were to review the Seventh Circuit's interpretation of 28 U.S.C. 2674 and determine that it was erroneous. The Seventh Circuit decided that Robert Molzof's recovery of damages for loss of enjoyment of life is barred by 28 U.S.C. 2674 and did not resolve whether he was entitled to such damages under Wisconsin law. Indeed, the court of appeals acknowledged that Wisconsin courts have not yet ruled on the question whether a comatose plaintiff is eligible for such damages under Wisconsin law. Pet. App. 7-8.

The question whether the FTCA bars recovery of damages for loss of enjoyment of life by a permanently comatose plaintiff is not an issue requiring this Court's review in the absence of a genuine conflict with practical consequences for real plaintiffs under clearly decided state law. This is not such a case.

2. The court of appeals also concluded that damages for future medical expenses beyond those necessary to supplement the care Molzof was receiving in the VA hospital would result in double recovery and would accordingly be punitive. That conclusion was based on the particular facts of this case, and, contrary to petitioner's assertion (Pet. 22-23), creates no conflict with decisions in other circuits.

The court of appeals determined, on the basis of factual findings by the district court, that the VA hospital where Robert Molzof was receiving care provided the best level of care available; that it was not in his best interest to be moved; that Shirley Molzof was satisfied with the level of care Robert Molzof was receiving and had no present intention to transfer him to a private facility; and that Robert Molzof's short life expectancy minimized the likelihood that these circumstances would change. Pet. App. 7. The court of appeals accordingly agreed with the district court that

an award for additional future medical expenses would result in double recovery with a punitive effect. *Id.* at 6-7.

Petitioner contends that this holding conflicts with *Ulrich* v. *Veterans Admin. Hosp.*, 853 F.2d 1078 (2d Cir. 1988), and *Feeley* v. *United States*, 337 F.2d 924 (3d Cir. 1964). In those decisions, the courts held that an FTCA plaintiff eligible for free VA medical care was entitled to an award for future medical expenses to permit him to choose whether he wished to continue to obtain such care from the VA. The court of appeals here took pains to state that it agreed with *Ulrich* and *Feeley* that the availability of free medical care to a veteran does not automatically limit an FTCA award for future medical expenses. Pet. App. 6-7. The court stressed, however, that the record in this case established no likelihood that Robert Molzof would transfer to a private facility, and thus no reason to believe that an award for future medical expenses (beyond that awarded to supplement the care at the VA hospital) would actually be used for such expenses. *Id.* at 7. The court thus agreed with the general principle in *Ulrich* and *Feeley*, and carefully distinguished the facts of this case.

The court of appeals' fact-bound decision that Molzof was not entitled to an award of additional damages for future medical care conflicts with no other appellate decisions and does not warrant this Court's review.[8]

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[8] Petitioner also claims (Pet. 29) that, if Congress had intended to prohibit double recovery in these circumstances, it would have included an explicit provision to that effect, as in 38 U.S.C. 351. But 38 U.S.C. 351 concerns the payment of VA disability benefits: it provides for a set-off, against future VA disability benefits, of any judgment or settlement of an FTCA claim arising from injuries suffered or aggravated as a result of hospitalization, medical or surgical treatment, or vocational rehabilitation provided by the VA. 38 U.S.C. 351 thus exclusively addresses circumstances in which, by definition, VA benefits and FTCA malpractice damages overlap. In contrast, 38 U.S.C. 610 (under which

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1991

Robert Molzof was eligible for free medical care) concerns the general eligibility of veterans with service-connected disabilities and of specified other veterans for hospitalization and nursing care. 38 U.S.C. 610 thus has a far broader scope than 38 U.S.C. 351, and includes many circumstances in which the issue of double recovery is not pertinent. That Congress did not explicitly provide for a set-off of FTCA damages against the medical benefits provided under 38 U.S.C. 610 thus does not establish that Congress intended to provide double recovery for tort plaintiffs who will receive such medical benefits.

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No. 90-838

In The

Supreme Court of the United States

October Term, 1990

SHIRLEY M. MOLZOF, as personal representative of the Estate of ROBERT E. MOLZOF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. How should the term "punitive damages," as used in 28 U.S.C. §2674, Federal Tort Claims Act, be defined?

2. Is a veteran, who is entitled to receive free medical care from the Veterans' Administration pursuant to 38 U.S.C. §610, entitled to recover damages for future medical expenses in an action under the Federal Tort Claims Act arising from the medical negligence of Veterans' Administration employees?

LIST OF PARTIES

The parties to these proceedings are petitioner Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, and respondent United States of America.

The claim of Robert E. Molzof, which is the subject of these proceedings, was originally brought by his guardian ad litem, Thomas H. Geyer. After the entry of final judgment in the United States District Court for the Western District of Wisconsin, but before the filing of the Notice of Appeal in the United States Court of Appeals for the Seventh Circuit, Robert E. Molzof died. Accordingly, Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, was substituted as plaintiff-appellant in the appellate court.

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Molzof v. United States*, 911 F.2d 18 (7th Cir. 1990). The opinion of the United States District Court for the Western District of Wisconsin has not been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 30, 1990. The petition for a writ of certiorari was filed on November 27, 1990. The petition was granted on March 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1346(b), United States as defendant

28 U.S.C. §2674, Liability of the United States

38 U.S.C. §351, Benefits for persons disabled by treatment or vocational rehabilitation

38 U.S.C. §610, Eligibility for hospital, nursing home, and domiciliary care.

The full text of these statutes is included in the appendix to this brief.

STATEMENT OF THE CASE

I. Nature Of The Case.

This is an action under the Federal Tort Claims Act seeking recovery of damages for personal injuries sustained by Robert E. Molzof on November 2, 1986, as a result of medical negligence on the part of employees of a Veterans' Administration hospital where Mr. Molzof was a patient.

II. Statement Of Facts, Procedural History Of The Case, And Disposition In The Courts Below.

On October 31, 1986, Robert E. Molzof underwent surgery to remove a lobe of his lung at the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin. As part of his post-operative care, he was temporarily placed on a ventilator. On November 2, 1986, employees of the hospital disconnected the alarm system on his ventilator and while the alarm was disconnected, a tube providing oxygen to Mr. Molzof became disconnected. The tube disconnection was discovered eight minutes later, at which time, Mr. Molzof's heart rate was between 30 and 40 beats per minute. By the time a physician arrived, Mr. Molzof was in complete cardiac arrest. He was not resuscitated until almost a half hour later. As a result of this episode, Mr. Molzof suffered anoxic encephalopathy. (R. 38:2) In other words, he suffered irreversible brain damage due to oxygen deprivation.

As a result of the anoxic encephalopathy, Mr. Molzof was in a permanent vegetative state. He required a ventilator for assistance in breathing and a nasogastric tube for nutrition and hydration. (R. 38:4) He was in need of hospitalization for the balance of his life, and resided at the Veterans' Administration Hospital in Tomah, Wisconsin at the time of trial. (R. 38:3-4)

Mr. Molzof was a veteran who suffered from a service-connected disability and was accordingly entitled to receive free medical care from the Veterans' Administration pursuant to 38 U.S.C. §610. (R. 75:269) He had a zero percent service-connected disability rating for two conditions: flat feet and sinusitis. (R. 75:267-68)

On September 29, 1988, Robert E. Molzof and his wife, Shirley M. Molzof, commenced this action against the United States of America seeking recovery of the damages they had sustained as a result of the hospital

employees' negligence. (R. 2) The action was commenced in the United States District Court for the Western District of Wisconsin, and jurisdiction in that court was based upon 28 U.S.C. §1346(b) and on Chapter 171 of Title 28 of the United States Code.

The United States admitted that the hospital employees were negligent and that such negligence caused brain damage to Mr. Molzof. (R. 5:1; 38:2-3) Since the United States admitted liability, only the issue of damages was tried before the court, Judge John C. Shabaz, presiding. (R. 74; 75; 76) The court subsequently made oral findings of fact and conclusions of law, including the following:

Findings Of Fact

1. Based on a consideration of the testimony of three expert witnesses and a summary of Mr. Molzof's medical records, the court determined that Mr. Molzof had a life expectancy of three years at the time of trial. (R. 76:329)

2. The care received by Mr. Molzof at the Veterans' Administration Hospital in Tomah, Wisconsin was reasonable, necessary and adequate. (R. 76:330-31)

3. Shirley Molzof was satisfied with the services provided to her husband, except that she was concerned with the lack of communication between her and the medical profession, the failure to provide physical therapy to her husband, and with the fact that visits by physicians occurred once per month, rather than more often. (R. 76:331).

4. Mrs. Molzof had not shown to the satisfaction of the court that additional places of care, other than the

Veterans' Administration Hospital in Tomah, were available. Although care at one hospital in Madison, Wisconsin may have been available, Mrs. Molzof had not demonstrated that the care provided there would have been the same or similar to that provided at the Veterans' Administration Hospital. (R. 76:331-32)

5. The medical testimony most favorable to the Molzofs suggested that Mr. Molzof not be transferred to another hospital. (R. 76:332)

6. Mrs. Molzof had no intention at the time of trial to transfer her husband to another institution. (R. 76:332)

7. At the Veterans' Administration Hospital in Tomah, there was a physical therapy staffing shortage, a lack of sufficient respiratory therapists, and a lack of weekly visits by the doctor. (R. 76:332)

8. The costs of providing similar treatment to Mr. Molzof at a private institution were the following: the per diem rate was $915 per day, annualized at $333,975; respiratory therapy at a rate of $50 per visit, three visits per day, annualized at $54,750; physical therapy at a rate of $50 per visit, one visit per week, annualized at $2,600; occupational therapy at a rate of $50 per visit, one visit per month, annualized at $600; the stipulated cost of disposable equipment was $37,388.88 per year; the stipulated cost of medication was $12,229.13; and the stipulated cost of medical attention was $2,340 per year. (R. 76:332-33)

Conclusions Of Law

1. Because Mr. Molzof was entitled to free medical care from the Veterans' Administration for the remainder of his life, he was not entitled to recover damages for future medical care, except for the care which was not being provided at the Veterans' Administration Hospital in Tomah. (R. 76:334-36)

2. It was not in the best interest of Mr. Molzof to move him from the Veterans' Administration facility to other hospitals, and Mrs. Molzof had no intention to have Mr. Molzof moved to another facility. (R. 76:336)

3. The care provided at the Veterans' Administration Hospital was adequate, reasonable and necessary. Mr. Molzof was entitled to continue to receive adequate, necessary and reasonable hospitalization at the level which he was receiving at the time of trial, and such hospitalization should continue throughout the rest of his life. The court concluded that in addition to the care which Mr. Molzof was receiving at the time of trial, he should receive physical therapy of one visit per week, at $50 per visit, annualized at $2,600; he should receive additional respiratory therapy of one visit per day, at $50 per visit, annualized at $18,250; and he should receive additional medical attention in the form of physician visits, in the amount of $1,800 per year. The court concluded that such medical care was to be provided for the three-year remaining life expectancy of Mr. Molzof. (R. 76:336-37) The court did not indicate how this remedy was to be implemented.

4. The court concluded that an award greater than that provided by the court for future medical needs would be a double recovery, and would also be punitive in nature to the United States, since the government would be providing medical care through the balance of Mr. Molzof's life, but would nonetheless be required to pay damages for Mr. Molzof's future medical needs, which would not be used for that purpose. (R. 76:337-38)

5. Mr. Molzof was not entitled to recover damages for loss of enjoyment of life. Any damages for loss of enjoyment of life would not have been compensatory to him, since he was comatose. Since such damages were not compensatory, they were punitive in nature and could

not be awarded under the Federal Tort Claims Act. (R. 76:338-40)

On July 12, 1989, Judge Shabaz issued a Memorandum and Order (R. 68), which was subsequently amended by a corrected memorandum issued on August 15, 1989. (R. 77) In its memorandum, the court essentially reiterated its conclusions of law. The court determined that Mr. Molzof was entitled to future reasonable, necessary and adequate care, to include full hospitalization for the remainder of his life at a Veterans' Administration hospital, together with $7,800 for physical therapy, $54,750 for respiratory therapy, and $5,400 for weekly physician's visits, for a total of $67,950. (R. 77) The court also determined that an adequate award for loss of enjoyment of life, if such an award were permissible under the law, would be $60,000. (R. 68:3)

On July 12, 1989, judgment was entered in favor of Mr. Molzof against the United States in the amount of $67,950, and the government was ordered to provide Mr. Molzof with reasonable, adequate and necessary care, to include hospitalization for the remainder of his life at a Veterans' Administration facility. (R. 69).

Robert Molzof appealed from that portion of the judgment entered on July 12, 1989 in which he was denied an award for future medical expenses and denied an award for loss of enjoyment of life.

On August 30, 1990, the United States Court of Appeals for the Seventh Circuit issued its decision. The appellate court held that Mr. Molzof was not entitled to recover damages for future medical care in an amount in excess of the $67,950 (erroneously stated by the appellate court to be $75,750) awarded by the district court. The appellate court reasoned that since Mr. Molzof was entitled to receive free medical care from the Veterans'

Administration and since there was no evidence indicating that he was not going to receive such free care, any greater award for future medical expenses would be duplicative and punitive and hence barred by the Federal Tort Claims Act prohibition of "punitive damages" set forth in 28 U.S.C. §2674. 911 F.2d at 20-21. The court also held that Mr. Molzof was not entitled to recover damages for loss of enjoyment of life since Mr. Molzof, being comatose, would not be able to benefit from the money. Such damages would, therefore, not be compensatory, but would be punitive in nature and were thus barred by the Act. 911 F.2d at 21-22. Accordingly, the appellate court affirmed the judgment of the district court.

Shirley M. Molzof, as personal representative of the Estate of Robert E. Molzof, filed a petition for a writ of certiorari, which was granted by this Court on March 18, 1991.

SUMMARY OF ARGUMENT

The Seventh Circuit's conclusion that damages for future medical expenses in excess of $67,950 and damages for loss of enjoyment of life were punitive and hence barred by the prohibition of "punitive damages" in 28 U.S.C. §2674 was based upon a determination that "punitive damages" are "damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort." 911 F.2d at 20-21. This definition of "punitive damages" is contrary to the express language of 28 U.S.C. §2674; is inconsistent with the primary purpose of the Federal Tort Claims Act, which is to render the United States liable for the torts of its employees to the same extent as a private individual would be liable under state law; and results in narrowing the waiver of sovereign immunity which the Act was

intended to accomplish. Application of this definition is also inequitable and unworkable.

In barring "punitive damages," Congress only intended to prohibit awards of those damages which are based upon the culpability of the tortfeasor's conduct and are intended to act as punishment for that conduct. Congress essentially wanted to prevent the Government from being financially punished for the torts of its employees. Thus, 28 U.S.C. §2674 must be interpreted so as to permit awards against the United States of those state law damages which are intended by state law to act as compensation for injuries sustained as a result of the tort, and to preclude awards of damages which are intended to act as punishment for egregious conduct.

Robert Molzof made no claim for punitive damages in this case. His claims for future medical expenses and loss of enjoyment of life were based upon Wisconsin law which allows an injured person to receive compensation for such damages. The question of whether Mr. Molzof was entitled to recover such damages should be determined under Wisconsin law. The prohibition of "punitive damages" in 28 U.S.C. §2674 cannot act as a bar to his recovery of such state law damages.

ARGUMENT

The Federal Tort Claims Act, enacted in 1946, provides generally that the United States shall be liable for tortious conduct committed by its employees acting within the scope of their employment "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b). The Act also provides that "[t]he United States shall be liable, . . . , in the same manner and to the

same extent as a private individual under like circumstances, but shall not be liable . . . for punitive damages." 28 U.S.C. §2674. The principal question before the Court is how the term "punitive damages" is to be interpreted.

Punitive damages have long been accepted as part of traditional tort law by the state courts and federal courts, including this Court. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984); *Smith v. Wade*, 461 U.S. 30, 35 (1983). Recently, in *Pacific Mutual Life Insurance Co. v. Haslip*, ___ U.S. ___, 111 S.Ct. 1032 (1991), the Court held that the common law method of assessing punitive damages is not *per se* violative of the Due Process Clause of the Fourteenth Amendment.

Punitive damages have traditionally been viewed as those damages which are based on the culpability of the tortfeasor's conduct and are meant to punish the tortfeasor for that conduct and to deter him and others from similar conduct in the future. Restatement (Second) of Torts §908 (1979); Prosser and Keaton, *The Law of Torts*, §2, pp. 9-10 (5th ed. 1984); 4 Harper, James and Gray, *The Law of Torts*, §25.5A (2nd ed. 1986); McCormick, *Handbook on the Law of Damages*, §77 (1935). The focus of punitive damages is on the character of the tortfeasor's conduct, not the extent of injury sustained by the claimant.

This Court's view of punitive damages is consistent with the traditional common law view. In *Day v. Woodworth*, 13 How. 363, 371 (1852), this Court observed:

> It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more

> than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured.

In *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U.S. 489, 492 (1875), the Court noted that the premise of the doctrine of punitive damages is "not that the sufferer is to be recompensed, but that the offender is to be punished."

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. at 1042, the Court noted that punitive damages are usually imposed for purposes of retribution and deterrence, and approved the traditional common law method of assessing punitive damages, whereby the jury determines the amount of a punitive damage award after considering the gravity of the wrong and the need to deter similar wrongful conduct, and the trial and appellate courts review the jury's determination to ensure that it is reasonable.

See also the cases cited in *Smith v. Wade*, 461 U.S. at 35, n. 3.

This traditional concept of punitive damages as being those damages which are intended as punishment for aggravative conduct has been applied by three circuit courts of appeal in defining what is meant by "punitive damages" as that term is used in the exception to the waiver of tort immunity set forth in 28 U.S.C. §2674. *Rufino v. United States*, 829 F.2d 354, 362 (2nd Cir. 1987); *Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978); *Manko v. United States*, 830 F.2d 831, 836 (8th Cir. 1987). This definition has also found support in the Ninth Circuit. *Shaw v. United States*, 741 F.2d 1202, 1208 (9th Cir. 1984); *Yako v. United States*, 891 F.2d 738, 747 (9th Cir. 1989).

Other courts of appeal, however, have rejected traditional tort principles in defining "punitive damages" for purposes of 28 U.S.C. §2674. Instead, they have created a federal standard for the definition of "punitive damages," and have defined the term to mean any damages in excess of the amount necessary to compensate the claimant. Applying this definition, the courts have determined that certain elements of damages, treated and labeled under state law as being compensatory, were actually punitive in nature and therefore not recoverable. *D'Ambra v. United States*, 481 F.2d 14, 16-21 (1st Cir. 1973), cert. denied, 414 U.S. 1075 (1973); *Flannery v. United States*, 718 F.2d 108, 110-11 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Hartz v. United States*, 415 F.2d 259, 264-65 (5th Cir. 1969); *Felder v. United States*, 543 F.2d 657, 667-70 (9th Cir. 1976). But see: *Reilly v. United States*, 863 F.2d 149, 164-65 (1st Cir. 1988).

In this case, the Court of Appeals for the Seventh Circuit adopted the latter view of "punitive damages." The Court stated:

> Since it is well settled that the purpose of the Act is compensation, the majority of circuits define "punitive damages" under the Act as any damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort. . . . Whether or not an award carries with it the deterrent and punishing attributes typically associated with the word "punitive", to the extent that an award gives more than the actual loss suffered by the claimant it is punitive and nonrecoverable.

911 F.2d at 20-21, citing *Flannery v. United States*, 718 F.2d at 111.

Relying on this definition of "punitive damages," the court held that Mr. Molzof was not entitled to recover damages for future medical expenses in excess of the

amount awarded by the district court, or to recover damages for loss of enjoyment of life, because such damages would not result in compensating Mr. Molzof and were, therefore, punitive.

It is the position of the petitioner that the Seventh Circuit erroneously interpreted the term "punitive damages" for purposes of 28 U.S.C. §2674. The petitioner believes that in applying the prohibition against "punitive damages" in a Federal Tort Claims action, the federal courts must view punitive damages in the manner in which they are viewed under traditional common law tort principles, as damages which are designed to punish a tortfeasor for egregious conduct. If the damages which are awarded in accordance with state law in a Federal Tort Claims action are intended by that state's law to act as compensation for the claimant and are not assessed on the basis of the degree of culpability of the tortfeasor's conduct or awarded for the purpose of punishing that conduct, then those damages cannot be considered to be "punitive damages" for purposes of 28 U.S.C. §2674. This interpretation of the term "punitive damages" is consistent with the language of 28 U.S.C. §2674 and the purpose of the Tort Claims Act.

I. THE TERM "PUNITIVE DAMAGES" AS USED IN 28 U.S.C. §2674 MUST BE INTERPRETED IN ACCORDANCE WITH TRADITIONAL TORT PRINCIPLES TO MEAN THOSE DAMAGES WHICH ARE BASED ON THE CULPABILITY OF THE TORTFEASOR'S CONDUCT AND ARE INTENDED TO HAVE A DETERRENT AND PUNISHING EFFECT.

A. The Language Of 28 U.S.C. §2674 Indicates That The Type Of Damages For Which The United States Is Not To Be Held Liable Are Those Which Are Intended To Inflict Punishment.

The starting point for the analysis of 28 U.S.C. §2674 is the language of the statute itself. *Kosak v. United States*,

465 U.S. 848, 853 (1984). The language of the statute must be given its plain and ordinary meaning. *Id.* at 353; *Richards v. United States*, 369 U.S. 1, 9 (1962).

Section 2674 states that the United States "shall not be liable . . . for punitive damages." The ordinary meaning of the term "punitive" is "inflicting, awarding, or involving punishment or penalties: aiming at punishment." Webster's Third New International Dictionary (1976 ed.). Similarly, Black's Law Dictionary (5th ed. 1979) defines "punitive" as "Relating to punishment; having the character of punishment or penalty; inflicting punishment or a penalty." The term "punitive" carried the same meaning at the time 28 U.S.C. §2674 was enacted. The Oxford English Dictionary (1933 ed.) defines "punitive" as "Awarding, inflicting, or involving punishment; retributive, punitory." See also: Black's Law Dictionary (3rd ed. 1933). Thus, the express words of the statute itself indicate that in enacting the Tort Claims Act, Congress intended to preclude awards of those damages whose purpose is to punish the tortfeasor. Congress could not have used a more precise term than "punitive" to convey the idea that it was prohibiting damage awards which would punish the United States for the torts of its employees.

In other cases involving the interpretation of a section of the Tort Claims Act, this Court has held that the legislative intent was sufficiently evident from the language which Congress chose. For instance, in *United States v. Spelar*, 338 U.S. 217 (1949), the Court was concerned with the application of 28 U.S.C. §2680(k) which excludes claims "arising in a foreign country." In that case, a wrongful death occurred on an air base in Newfoundland which was leased to the United States. In holding that the claim fell within the exclusion, the Court held that the term "foreign country" meant precisely that,

and did not refer only to land which was not in the possession of the United States.

In *Richards v. United States*, 369 U.S. 1, the Court was concerned with the construction of that portion of 28 U.S.C. §1346(b) which provides that the Government's liability is to be determined "in accordance with the law of the place where the act or omission occurred." The Court held that the plain language of the statute referred to the whole law, including the choice-of-law rules, and not just the internal law, and further held that the law to which reference was made was the law of the place where the negligence occurred, and not the place where the negligence had its operative effect.

In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the Court read 28 U.S.C. §2674 in accordance with its plain language to impose liability on the United States "in the same manner and to the same extent as a private individual under *like* circumstances" (emphasis supplied), and not under the *same* circumstances, as argued by the Government.

See also: *United States v. Smith*, ___ U.S. ___, 111 S.Ct. 1180, 1188 (1991) ("any employee of the Government" as used in 28 U.S.C. §2679(b)(1) means *any* employee).

Similarly, the term "punitive damages" must be interpreted in accordance with its plain meaning to refer to damages which are intended to inflict punishment.

B. In Construing 28 U.S.C. §2674, It Must Be Assumed That When Congress Enacted The Tort Claims Act, It Was Aware Of The Established Tort Definition Of Punitive Damages.

Not only must the term "punitive damages" be construed in accordance with its ordinary meaning, but it must be construed in accordance with the traditional tort definition of punitive damages, because it must be

assumed that Congress had the traditional definition in mind when it enacted 28 U.S.C. §2674. Such an interpretation finds support in the reasoning of this Court in *United States v. Neustadt*, 366 U.S. 696 (1961).

In *Neustadt*, the Court was concerned with the interpretation of 28 U.S.C. §2680(h) which precludes recovery under the Tort Claims Act for "[a]ny claim arising out of . . . misrepresentation." The case involved a claim against the United States by home purchasers for damages resulting when they relied on a negligently excessive FHA appraisal and were induced by the seller to pay a price in excess of the fair market value of the home. The Court held that the claim of the home purchasers arose out of misrepresentation and hence was not actionable. In doing so, the Court, citing Restatement of Torts §552 (1938) and Prosser, *Torts* (1941 ed.), interpreted the term "misrepresentation" according to the traditional and commonly understood legal definition of the tort of "negligent misrepresentation" as would have been understood by Congress when the Tort Claims Act was enacted. 366 U.S. at 706-07. The Court stated: "Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending 'some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.' " 366 U.S. at 707-08, quoting *United States v. Spelar*, 338 U.S. at 219-20.

The same reasoning is applicable here. At the time 28 U.S.C. §2674 was enacted, punitive damages were viewed as they are today, as damages which are based on the culpability of the tortfeasor's conduct and are intended to punish him for that conduct and to deter him and others from like conduct. Restatement of Torts §908 (1939); Prosser, *Torts* §2, pp. 11-12 (1941 ed.) Congress certainly must

have been aware of this tort concept of "punitive damages" when it enacted 28 U.S.C. §2674, and must have intended that term to be interpreted in accordance with traditional tort principles, rather than in accordance with some definition created by the federal courts. Accordingly, the term must be interpreted to refer to those damages which are assessed according to the degree of culpability of the tortfeasor and are intended as punishment.

In other cases, this Court has relied on traditional tort principles in applying provisions of the Tort Claims Act. In *Williams v. United States*, 350 U.S. 857 (1955), the Court held that the question of whether a federal employee was "acting within the scope of his office or employment" under 28 U.S.C. §§1346(b) and 2671 is controlled by the state law doctrine of *respondeat superior*, and not by a federal standard.

In *Logue v. United States*, 412 U.S. 521 (1973) and *United States v. Orleans*, 425 U.S. 807 (1976), the Court was concerned with the question of whether an entity was a "federal agency" or a "contractor of the United States," which is excluded from the definition of "federal agency" in 28 U.S.C. §2671. The Court relied on principles of tort and agency law, which make a distinction between a servant or agent relationship and an independent contractor relationship and rest that distinction upon the authority of the principal to control the physical conduct of the contractor.

C. This Court Has Recognized That The Term "Punitive Damages" Is To Be Interpreted To Mean Those Damages Which Serve As Punishment.

On one occasion, this Court has addressed the meaning of the term "punitive" as used in 28 U.S.C. §2674. In *Massachusetts Bonding & Insurance Co. v. United States*, 352

U.S. 128 (1956), the Court was concerned with the application of the second paragraph of §2674 which provides:

> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Suit was brought in that case for a death which occurred in Massachusetts. The Massachusetts Death Act imposed liability on a person causing the death of another person for damages not less than $2,000 nor more than $20,000 " 'to be assessed with reference to the degree of his culpability or of that of his agents or servants.' " 352 U.S. at 129. Consistent with the Massachusetts Supreme Court's interpretation of the statute as being " 'penal,' " this Court held that the statute provided for punitive damages. 352 U.S. at 129. Applying the second sentence of §2674, the Court accordingly held that the United States could only be held liable for compensatory damages. The real question was, however, whether the minimum and maximum limits contained in the Massachusetts Death Act applied to an award of compensatory damages. This Court held that the limitation did not apply. In doing so, the Court indicated that punitive damages are those which serve as punishment for a defendant's culpable conduct:

> By definition, punitive damages are based upon the degree of the defendant's culpability. Where a state legislature imposes a maximum limit on such a punitive measure, it has decided that this is the highest punishment which should be imposed on a wrongdoer. This limitation, based

> as it is on concepts of punishment, cannot control a recovery from which Congress has eliminated all considerations of punishment.

352 U.S. at 133.

See also *Carlson v. Green*, 446 U.S. 14, 22 (1980), where this Court equated the "punitive damages" prohibited by 28 U.S.C. §2674 with the punitive damages which are recoverable in an action under 42 U.S.C. §1983 and which are awarded to punish the tortfeasor for his outrageous conduct. *Smith v. Wade*, 461 U.S. 30.

In accordance with *Massachusetts Bonding*, the term "punitive damages" should be interpreted in this case to mean damages which are based on the degree of the tortfeasor's culpability and are assessed as punishment.

D. Interpretation Of The Term "Punitive Damages" In Accordance With Traditional Tort Principles Is Consistent With The Intent Of The Tort Claims Act.

Interpretation of the term "punitive damages" in accordance with traditional tort principles to mean those damages which are intended as punishment is supported by the plain language of §2674 and this Court's discussion in *Massachusetts Bonding*. Such an interpretation is also consistent with the purpose of the Tort Claims Act to render the United States liable to the same extent as a private individual would be.

1. Interpretation of the term "punitive damages" in accordance with traditional tort principles is consistent with the purpose of the Act to render the United States liable to the extent that private individuals are liable under applicable state law.

The Federal Tort Claims Act was designed so that, with certain exceptions, the United States is rendered

liable in tort under state law principles to the same extent as a private individual would be under like circumstances. *Richards v. United States*, 369 U.S. at 6. Title 28, U.S.C. §1346(b) provides that the liability of the Government for the conduct of its employees is the same as that "under circumstances where . . . a private person . . . would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Similarly, under 28 U.S.C. §2674, the United States is liable "in the same manner and to the same extent as a private individual under like circumstances." Thus, the Act gives a prominent role to state law. Both the liability of the United States and the measure of damages to be assessed against it are to be governed by state law. In *Richards v. United States*, 369 U.S. at 6-7, this Court stated that "the Act was not patterned to operate with complete independence from the principles of law developed in the common law and refined by statute and judicial decision in the various States. Rather, it was designed to build upon the legal relationships formulated and characterized by the States."

If the purpose of the Tort Claims Act is to render the United States liable in tort as a private person would be liable under applicable state law, this would lead one to conclude that the components and measure of damages are to be controlled by state law. Thus, if state tort law permits an injured person to recover against a private individual for such items of damage as medical expenses, loss of earnings and earning capacity, and pain and suffering, then a person injured by the tortious acts of an employee of the United States should be able to recover for such items as well. The only limitation on the recovery of damages is that a claimant cannot recover against the United States for "punitive damages." 28 U.S.C. §2674.

In order to fulfill the purpose of the Tort Claims Act to render the Government liable as a private person would be liable under state law and to provide for a method of assessing damages which is workable in practice, the term "punitive damages" in 28 U.S.C. §2674 must be interpreted in accordance with the traditional common law concept of punitive damages. Section 2674 must be interpreted in such a manner that the claimant is allowed to recover for those elements of state law damages which are intended by state law to serve as compensation for the claimant, but is precluded from recovering any damages which are not based upon compensation, but which are awarded separately and are measured by the degree of culpability of the tortfeasor and intended to punish him for his conduct. An analysis of the definition of "punitive damages" utilized by the Seventh Circuit Court of Appeals in this case demonstrates why this is the only interpretation of §2674 which can be adopted.

The Seventh Circuit, relying on the definition adopted by the Fourth Circuit Court of Appeals in *Flannery v. United States*, 718 F.2d at 111, defined "punitive damages" for purposes of §2674 as "any damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort." 911 F.2d at 20-21. The Seventh Circuit held that regardless of whether "an award carries with it the deterrent and punishing attributes typically associated with the word 'punitive,' " an award of damages is nevertheless "punitive" if it "gives more than the actual loss suffered by the claimant." 911 F.2d at 21.

The petitioner acknowledges the fact that the purpose of the Tort Claims Act is compensation, but the question here is how the compensation is to be measured. The petitioner believes that the claimant's compensation is to be measured in accordance with what state law

views to be compensation. The claimant should be precluded from recovering only those damages which are not based on the extent of the claimant's loss, but instead are specifically awarded for the purpose of punishing the tortfeasor for his egregious conduct.

Adoption of the standard utilized by the Seventh Circuit that "punitive damages" are *any* damages in excess of the amount necessary to compensate the claimant regardless of their punishing or deterrent attributes would severely interfere with the structure of the Tort Claims Act which provides for recovery according to the law of the place where the act or omission occurred. Under the Seventh Circuit's definition of punitive damages, a federal court would be required to ignore a state's characterization of state law damages as being compensatory, and would, instead, be required to analyze each and every item of state law damage in order to determine whether the item of damage is, in fact, necessary to compensate the claimant for his loss, and then prohibit the award of any damages which are unnecessary to compensate the claimant. For instance, an award of damages for pain and suffering, which is a standard element of damages in a personal injury action, would have to be scrutinized in order to determine whether the award, or any part of it, is actually necessary to compensate the claimant. The same process would then have to be undertaken with respect to every other element of state law damages, i.e., loss of earnings, impairment of future earning capacity, past medical expenses, future medical expenses, loss of society and companionship, emotional distress. An analysis of each item of state law damage would have to be made, because it is conceivable that, if the Seventh Circuit standard were adopted, the Government could argue in every case that the method utilized by state law in measuring each damage component

results in an award which exceeds the amount actually necessary to compensate the claimant.

Moreover, if the Seventh Circuit's definition of "punitive damages" were applied literally, this would result in destroying a claimant's right to recover non-economic damages, a right which is well-recognized under state tort law. The Seventh Circuit held that "punitive damages" are "damages in excess of those necessary to compensate the victim or his survivors for the *pecuniary loss* suffered by reason of the tort." (Emphasis supplied.) 911 F.2d at 20-21. If the language used by the Seventh Circuit were applied literally, this would mean that a claimant in a Tort Claims action could not recover for non-pecuniary losses, such as pain, suffering and disability, loss of enjoyment of life, loss of society and companionship, emotional distress, and mental anguish. If Congress' overall purpose in enacting the Tort Claims Act was to render the United States liable under state tort law to the same extent as a private individual would be liable, it certainly could not have intended to preclude claimants in Tort Claims actions from recovering an entire category of damages which are well-entrenched in state tort law.

This Court has emphasized on numerous occasions that the central purpose of the Tort Claims Act is to render the Government liable in tort as a private individual would be liable under like circumstances, and that the Act should be interpreted so that this purpose is not thwarted. *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 370 (1949); *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951); *Indian Towing Co. v. United States*, 350 U.S. at 64, 68-69; *Rayonier Incorporated v. United States*, 352 U.S. 315, 318-19 (1957); *Richards v. United States*, 369 U.S. at 6-7, 8, 11-12; *United States v. Muniz*, 374 U.S. 150 (1963). However, interpretation of the prohibition of "punitive damages" in the manner utilized by the Seventh Circuit

would result in nullifying, with respect to damage assessment matters, the requirement of the Act that the United States is to be held liable as a private individual would be liable in accordance with the applicable state law. Non-economic damages which are a recognized part of state tort law would not be recoverable at all because they are not necessary to compensate a claimant for "pecuniary loss." Measurements of those damages which are intended by state law to compensate for economic losses would also have to be disregarded entirely, because of the possibility that such measurements would exceed the amount which federal courts would view as necessary to compensate the claimant for his pecuniary loss. In the place of state law, there would develop an entire body of federal law ascertaining and delineating what types of damages are recoverable under the Tort Claims Act as damages which compensate the claimant for his pecuniary loss and detailing how those damages are to be measured. Certainly, Congress could not have intended such a result when it prohibited awards of "punitive damages."

2. Adoption of the Seventh Circuit's definition of "punitive damages" would result in the establishment of a federal standard not warranted by the Tort Claims Act.

In interpreting the Tort Claims Act, this Court should not assume that Congress has enacted a federal standard independent of state law. *Richards v. United States*, 369 U.S. at 13. Thus, in interpreting the prohibition against "punitive damages" in §2674, the Court cannot adopt a definition of "punitive damages" which would result in nullifying the general requirement of 28 U.S.C. §§1346(b) and 2674 that damages are to be assessed in accordance with applicable state law and, instead, adopt a federal standard for measuring compensatory damages.

This Court has adopted a federal standard when such a standard is necessary to implement the Tort Claims Act. For instance, in *Feres v. United States*, 340 U.S. 135 (1950), this Court established the rule that the Government is not liable under the Tort Claims Act for injuries to servicemen under circumstances where the injuries arise out of or are in the course of activity incident to military service. Establishment of this federal rule was warranted by the distinctly federal relationship between military personnel and the Government, which relationship had always been governed by federal law. The Court reasoned that in enacting the Tort Claims Act, Congress could not have intended to disturb this relationship and depart from established federal law by subjecting the Government to suits for service-connected injuries under state law. 340 U.S. at 146.

However, the Court has been reluctant to establish other federal standards when they are not necessary to fulfill the purpose of the Tort Claims Act. For instance, in *Richards v. United States*, 369 U.S. 1, the Court refused to adopt a federal conflict of law rule in multi-state tort actions. Instead, the Court held that in subjecting the Government to liability "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. §1346(b), Congress intended a federal court to apply the whole law of the state where the tort occurred, including the conflict of law rules of that state. The Court noted that this interpretation of §1346(b) was consistent with the intent of the Act to treat the United States as a private individual would be treated under like circumstances. 369 U.S. at 11. In *Williams v. United States*, 350 U.S. 857, the Court held that the question as to whether a federal employee was "acting within the scope of his office or employment," 28 U.S.C. §§1346(b) and 2671, is not to be determined by reference to some federal standard, but,

rather, is controlled by the state doctrine of *respondeat superior*.

In this case, there is no need to adopt a federal standard for defining "punitive damages" which is different from the manner in which punitive damages are viewed under traditional tort principles. Section 2674 can simply be interpreted so that a claimant is allowed to recover for those damages which are intended by state law to act as compensation for injuries, and is precluded from recovering those damages which are based on the degree of the tortfeasor's culpability and are awarded as punishment for his conduct.

3. The Seventh Circuit's definition of "punitive damages" would result in expanding the exception in 28 U.S.C. §2674 beyond that intended by Congress.

Not only has this Court held that the Tort Claims Act is to be interpreted in a manner consistent with the policy underlying the Act, which is to hold the United States liable to the same extent as a similarly situated private individual would be liable under state law, but the Court has also held that the Act is not to be construed so as to narrow the waiver of tort immunity which Congress intended. This Court has expressed this principle in various cases. In *United States v. Aetna Casualty & Surety Co.*, 338 U.S. at 383, the Court, quoting Judge Cardozo's statement in *Anderson v. John L. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30, (1926) stated: " 'The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.' " In *Indian Towing Co. v. United States*, 350 U.S. at 69, the Court stated that "when

dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." In *Rayonier Incorporated v. United States*, 352 U.S. at 320, the Court stated: "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it." Again, in *United States v. Muniz*, 374 U.S. at 165-66, the Court stated: "We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress."

Although Congress has created certain exceptions to the waiver of tort immunity, including the prohibition against awards of "punitive damages" in 28 U.S.C. §2674, the language of the exceptions is not to be construed so as to expand their applicability. See: *Block v. Neal*, 460 U.S. 289 (1983); *Berkovitz v. United States*, 486 U.S. 531 (1988); *Sheridan v. United States*, 487 U.S. 392 (1988). The same principle must be applied here.

In enacting 28 U.S.C. §§1346(b) and 2674, Congress indicated its general intention to waive the sovereign immunity of the United States and to render the United States liable in tort to the same extent as a private individual would be liable under state tort law in like circumstances. One of the exceptions to this waiver of tort immunity is the prohibition of awards for "punitive damages." However, in prohibiting awards of "punitive damages," Congress did not intend to nullify the general waiver of tort immunity. Yet, that would be the result if this Court were to adopt the Seventh Circuit's definition of "punitive damages."

Adoption of that definition would result in expanding the prohibition against "punitive damages" to an extent beyond that which Congress intended, and would result in narrowing the waiver of immunity which the Tort Claims Act was intended to accomplish. Under that definition, the Government would be immune from liability for numerous types of damages which state law views as being compensatory to a claimant and for which private individuals are held liable under state law. The Government would be immune from liability for any damages which, in the opinion of the federal courts, exceed the amount necessary to compensate the claimant, even though the intent of Congress in enacting 28 U.S.C. §2674 was merely to protect the United States from being punished for its employees' tortious conduct.

4. The Seventh Circuit's definition of "punitive damages" is unworkable in practice.

Not only would the adoption of the Seventh Circuit's definition of "punitive damages" impinge on the structure of the Tort Claims Act which provides for recovery of damages in accordance with state law, result in the establishment of a federal standard for assessment of damages to the exclusion of state standards for measuring compensatory damages, and result in narrowing the waiver of tort immunity which the Act was intended to accomplish, but the application of this definition would be difficult, if not impossible.

As indicated above, if the Seventh Circuit's definition were adopted, every element of state tort damages which are viewed under state law as being compensatory and which are not awarded as punishment for the tortfeasor's egregious conduct would have to be analyzed by the federal courts to determine whether these damages are in

fact "punitive" because they exceed the amount necessary to compensate a claimant for his pecuniary loss. The decisions of the lower federal courts in which the interpretation of the term "punitive damages" was at issue provide only a few examples of the type of damage questions which would arise if the Seventh Circuit's definition were actually attempted to be utilized in every case. In these decisions, the following questions have arisen:

> Whether an award of damages for the value of the life of a decedent should be reduced by the amount of personal expenses the decedent would have incurred had he lived, *Hartz v. United States*, 415 F.2d at 264.
>
> Whether parents of a deceased child may recover damages measured by the economic loss to the decedent's estate, *D'Ambra v. United States*, 481 F.2d 14.
>
> Whether an award of damages for a decedent's lost income should be reduced by the amount of federal and state income taxes the decedent would have had to pay on the future earnings if he had lived, *Hartz v. United States*, 415 F.2d at 264-65; *Felder v. United States*, 543 F.2d at 665-70.
>
> Whether an award to a widow in a wrongful death action should be reduced because the widow remarried and receives support from her new husband, *Kalavity v. United States*, 584 F.2d at 810-11.
>
> Whether a comatose plaintiff may recover for loss of enjoyment of life, since he cannot enjoy the money and therefore cannot be compensated by it, *Flannery v. United States*, 718 F.2d at 110-11; *Rufino v. United States*, 829 F.2d at 362.
>
> Whether a plaintiff with cognitive ability may recover damages for loss of enjoyment of life, *Burke v. United States*, 605 F.Supp. 981, 991-92 (D.Md. 1985); *Andrulonis v. United States*, 724 F.Supp. 1421, 1524-26 (N.D.N.Y. 1989).

> Whether income taxes should be deducted from an award for loss of future earnings, *Hollinger v. United States*, 651 F.2d 636, 642 (9th Cir. 1981); *Flannery v. United States*, 718 F.2d at 111-12; *Manko v. United States*, 830 F.2d at 836.
>
> Whether an award for loss of future earnings should be reduced by the amount of an award for future medical expenses, *Flannery v. United States*, 718 F.2d at 112.
>
> Whether a brain-damaged child may recover damages for pain and suffering, *Shaw v. United States*, 741 F.2d at 1208.
>
> Whether a brain-damaged child may recover damages for mental anguish, *Shaw v. United States*, 741 F.2d at 1208.
>
> Whether a brain-damaged child may recover damages for destruction of his ability to enjoy life, *Shaw v. United States*, 741 F.2d at 1208.
>
> Whether a brain-damaged child may recover for both lost earning capacity and anticipated future care. *Reilly v. United States*, 863 F.2d at 163-66.
>
> Whether an award to a brain-damaged child for loss of earning capacity should be reduced by the amount of money he would have spent on residential care had he not been injured, *Yako v. United States*, 891 F.2d at 746-47.
>
> Whether a severely disabled child may recover damages for lost earning capacity at all, *Anderson v. United States*, 731 F.Supp. 391, 402 (D.N.D. 1990).
>
> Whether plaintiffs in a wrongful death action may recover damages for sorrow, mental anguish, loss of society and companionship and comfort, *Imperial v. United States*, 755 F.Supp. 695, 696-97 (N.D.W.Va. 1990).
>
> Whether a grandparent of a severely disabled child who stands *in loco parentis* may recover for

loss of consortium, *Anderson v. United States*, 731 F.Supp. at 402.

Whether an award of future damages should be reduced to present value, *Funston v. United States*, 513 F.Supp. 1000, 1009 (M.D.Pa. 1981); *Barnes v. United States*, 685 F.2d 66, 70 (3rd Cir. 1982).

Whether an award should be reduced by the amount of collateral source benefits received by the claimant, *Smith v. United States*, 587 F.2d 1013, 1016-17 (3rd Cir. 1978); *Siverson v. United States*, 710 F.2d 557, 559-60 (9th Cir. 1983); *Aretz v. United States*, 456 F.Supp. 397, 404-08 (S.D.Ga. 1978), affirmed, 604 F.2d 417 (5th Cir. 1979); *Funston v. United States*, 513 F.Supp. at 1009-10; *Andrulonis v. United States*, 724 F.Supp. at 1524; *Anderson v. United States*, 731 F.Supp. at 400-02.

These are only a few examples of the types of questions which would arise if the Court were to adopt the Seventh Circuit's definition of "punitive damages" and the federal courts were thereby required to question and analyze the compensatory nature of any state law damage element. Moreover, if the Court were to adopt that definition, not only would the federal courts be required to analyze numerous types of state law damage elements, but the analysis of the compensatory nature of each element of damage would be a herculean task.

Kalavity v. United States, 584 F.2d 809, presents a good example of the type of analysis which the federal courts would have to make with respect to each state law damage element if this Court rejected state laws' assessment of compensatory damages and instead adopted the Seventh Circuit's definition of "punitive damages." In that case, where a woman who had remarried sought damages for the wrongful death of her first husband, the Government argued that since her remarriage entitled her to the support and companionship of her new husband, she was

not entitled to be compensated for the continuing loss of the support and affection of her dead husband. In rejecting this argument, the Sixth Circuit Court of Appeals stated:

> Damages do not become "punitive" when a court refuses to consider and reduce a wrongful death award because the decedent's spouse is now living with another person who supports her financially and emotionally. It would then have to consider the stability of the present marital or living arrangement, the strength of the relationship, the health of the new husband, the likelihood of death or separation, the amount of money the new partner contributes, the value of his companionship as compared to the deceased husband's. If the survivor is not yet remarried, the court or jury would have to consider her age, appearance and personality, her desire to marry again, and her chances of finding a marriage partner. The court or jury would also have to consider whether the survivor is telling the truth or simply trying to get a larger damage award if she says she will never remarry.

584 F.2d at 811.

A similar discussion appears in *Reilly v. United States*, 863 F.2d at 165, where the First Circuit Court of Appeals indicated that if it were to apply the *Flannery* definition of "punitive damages" which was applied here by the Seventh Circuit, the court would have to engage in a difficult process of trying to ensure that every award is free of duplication and does not overcompensate. That court noted that in awarding damages for hospital expenses, a court would have to reduce the amount of the hospital bills by the value of certain items on which the claimant would not have to expend money while hospitalized, including: food, because meals would be provided by the hospital; dry cleaning, because he would spend his time in hospital gowns; and heat, light and power at his residence.

If this Court were to adopt the Seventh Circuit's standard, that "punitive damages" are those in excess of the amount necessary to compensate the claimant, the claimant would be faced with an insurmountable burden in attempting to prove each and every possible item of offset to an element of state law damage. These offsets would have to be proven in order to preclude a federal court from issuing an award which could possibly be duplicative and to thereby avert the risk that the award would be labeled as "punitive" by the Government and thus nonrecoverable.

"There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Indian Towing Co. v. United States*, 350 U.S. at 68. In prohibiting an award of "punitive damages," Congress could not have intended to force a claimant to prove every element of damages with such precision and accuracy so as to render an award of such damages free from the taint of duplication and overcompensation. Similarly, Congress could not have intended the federal courts to devote the enormous amount of time and resources which would be needed to verify the accuracy of the claimant's mathematical calculations.

In assessing damages in a tort action, state law generally utilizes a limited number of relatively simple rules. For example, it is generally recognized that an injured person may recover in tort for certain well-defined types of damages, including pain and suffering, loss of earnings, impairment of future earning capacity, and past and future medical expenses. These state rules usually exclude from consideration in the measurement of such damages certain facts or uncertain future events. The exclusion of these factors may sometimes result in an

award of damages which is duplicative to some extent. However, the states utilize such rules because they are easily administered and their application is uniform in each case. Certainly, Congress could not have intended that an award of damages measured in accordance with these state rules was to be labeled as "punitive" every time application of such rules resulted in an award which was somewhat duplicative. In prohibiting an award of "punitive damages," Congress merely meant to prohibit those awards of damages which were intended to punish the Government for the egregious conduct of federal employees and not to prohibit those customary damages which are awarded under traditional state tort law principles.

This Court has held that the Tort Claims Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Feres v. United States*, 340 U.S. at 139. The statutory section should not be read in isolation, but must be read in conjunction with the whole Act, and with due regard to the purpose and object of the Act. *Richards v. United States*, 369 U.S. at 11. The only interpretation of the prohibition against "punitive damages" in §2674 which will (1) be consistent with the language chosen by Congress, (2) give effect to the Congressional purpose underlying the Act, which is to hold the United States liable under state law principles to the same extent as a similarly situated private individual, (3) give proper scope to the waiver of tort immunity which the Act was intended to accomplish, and (4) result in an application of the prohibition which will be practical and equitable, is to permit a claimant to recover under state tort principles for those elements of damages which state law intends to act as compensation for the claimant, and to bar recovery

of any separate award of damages which are based on the degree of the culpability of the tortfeasor's conduct and intended to punish him for such conduct.

II. THE DAMAGES FOR WHICH MR. MOLZOF SOUGHT RECOVERY ARE NOT "PUNITIVE" AND ARE NOT BARRED BY 28 U.S.C. §2674.

Application of the definition of "punitive damages" as being "damages in excess of those necessary to compensate the victim or his survivors for the pecuniary loss suffered by reason of the tort," 911 F.2d at 20-21, led the Seventh Circuit Court of Appeals to conclude that Mr. Molzof was not entitled to recover damages for future medical expenses in excess of the amount awarded by the district court or to recover damages for loss of enjoyment of life. The court reasoned that such damages would not result in compensation to Mr. Molzof and were, therefore, "punitive." However, application of the interpretation of 28 U.S.C. §2674 advanced by the petitioner, as prohibiting only those damages which are based on the egregious nature of the tortfeasor's conduct and are intended to act as punishment for that conduct, leads to the conclusion that an award of additional damages for future medical expenses and damages for loss of enjoyment of life cannot be prohibited in this case as being "punitive."

The Molzofs made no claim that the conduct of the employees at the Veterans' Administration Hospital in Madison was willful, wanton, or egregious in any way, and did not seek recovery of damages labeled as "punitive." They merely alleged that the hospital employees were negligent in the manner in which they rendered medical care to Mr. Molzof, causing improper operation of his ventilator and resulting in permanent brain damage. (R. 2:2) They further alleged that as a result of the hospital employees' negligence, Mr. Molzof sustained

pain and suffering, the requirement of ongoing medical care, loss of enjoyment of life, and other personal injuries. (R. 2:2-3) The Molzofs made no allegation that the conduct of the employees warranted the imposition of punitive damages. The Government admitted that the hospital employees were negligent and that such negligence caused brain damage to Mr. Molzof. (R. 5:1) Since the Government admitted liability, no trial was held on the issue of negligence. The case went to trial solely on the issue of damages, and the parties agreed that the matters which were in issue included the following matters which are relevant here: (1) the sum of money which would fairly and reasonably compensate Mr. Molzof for the reasonable and necessary cost of future care which he would require as a result of the Government's negligence, (2) the life expectancy of Mr. Molzof, and (3) the sum of money which would fairly and reasonably compensate Mr. Molzof for his loss of enjoyment of life. (R. 38:8-9)

Because of the stipulation of liability and the fact that the principal damage issues were those listed above, it is obvious that the Molzofs did not attempt and could not have attempted to prove that the hospital employees' conduct was egregious. Thus, no finding was made that the conduct was egregious or warranted the imposition of punitive damages, and no award of punitive damages, in the ordinary sense of the word, was made. Applying the definition of "punitive damages" which the petitioner urges the Court to adopt, it must be concluded that this case is simply not one in which punitive damages were either sought or awarded. Therefore, under the terms of 28 U.S.C. §2674, which renders the United States liable "in the same manner and to the same extent as a private individual under like circumstances," the question of whether Mr. Molzof was entitled to recover damages for

future medical expenses or loss of enjoyment of life should be determined in accordance with Wisconsin law.

A. Robert Molzof Was Entitled To Recover Damages For Future Medical Care.

1. There was sufficient evidence establishing Robert Molzof's entitlement to recover for future medical expenses.

The general rule in Wisconsin is that a plaintiff who has been injured by the tortious conduct of another is entitled to recover the reasonable value of medical and similar services reasonably required by the injury. *Thoreson v. Milwaukee & Suburban Transport Corp.*, 56 Wis.2d 231, 243, 201 N.W.2d 745 (1972); *Sulkowski v. Schaefer*, 31 Wis.2d 600, 608, 143 N.W.2d 512 (1966). In order to recover damages for future medical costs, the plaintiff must establish that his injury requires future medical treatment and the reasonable cost of that treatment. *Bleyer v. Gross*, 19 Wis.2d 305, 309-12, 120 N.W.2d 156 (1963).

In this case, there was sufficient evidence to establish Robert Molzof's entitlement to recover for future medical care. The parties stipulated that as a result of the anoxic encephalopathy caused by the negligence of the hospital employees, Mr. Molzof would continue to need ventilator assistance in breathing for the balance of his life, that he would need to continue to receive his nutrition via a nasogastric feeding tube for the balance of his life, and that he would need hospitalization for the balance of his life. (R. 38:4) The district court found that Mr. Molzof was in need of hospitalization throughout the rest of his life. (R. 76:336) In addition, the Molzofs proved and the district court found that Mr. Molzof was in need of physical therapy, occupational therapy, respiratory therapy, and medical attention for the balance of his life. (R. 76:336-37)

Thus, there was no dispute that at the time of trial, Mr. Molzof was in need of future medical treatment.

Moreover, the Molzofs established the reasonable cost of the medical care which Mr. Molzof would require in the future. Although the district court did not award damages for future medical care, it did find that the reasonable cost of medical care had been sufficiently proven. It found that the reasonable cost of providing treatment in a private institution similar to that being provided to Mr. Molzof at the Veterans' Administration Hospital in Tomah were the following: a per diem hospital rate of $915 per day, annualized at $333,975; respiratory therapy at a rate of $50 per visit, three visits per day, annualized at $54,750; physical therapy at a rate of $50 per visit, one visit per week, annualized at $2,600; occupational therapy at a rate of $50 per visit, one visit per month, annualized at $600; disposable equipment at a stipulated cost of $37,388.88 per year; medication at a stipulated cost of $12,229.13 per year; and medical attention at a stipulated cost of $2,340 per year. (R. 76:332-33) These amounts total $443,833.01.

In sum, the Molzofs presented sufficient evidence of Mr. Molzof's entitlement to recover damages for future medical care. Since the district court found that the cost of such care amounted to $443,833.01 per year and further found that Mr. Molzof's life expectancy at the time of trial was three years, the district court should have awarded damages for future medical care in the sum of $1,331,649.03.

2. The fact that Robert Molzof was entitled to free medical care from the Veterans' Administration did not preclude an award for future medical care.

Under 38 U.S.C. §610, a veteran with a service-connected disability is entitled to receive free medical care

from the Veterans' Administration. Robert Molzof had a service-connected disability because he had flat feet and sinusitis. The district court determined that because Mr. Molzof was entitled to receive free medical care from the Veterans' Administration, he was not entitled to recover damages for all future medical expenses. Rather, the district court determined that he was only entitled to recover an amount which would pay for medical care necessary to supplement the care he was receiving at the Veterans' Administration hospital where he was a patient. The district court reasoned that an award of all future medical expenses would result in a double recovery and would have a punitive effect on the Government. Accordingly, the district court ordered the Government to provide Mr. Molzof with the same level of care he was receiving at the Veterans' Administration hospital, and ordered the Government to pay for additional aspects of care – physical therapy, respiratory therapy, and doctor's visits – which Mr. Molzof needed, but which were not being provided at the Veterans' Administration hospital. The Seventh Circuit Court of Appeals agreed with the reasoning of the district court, and concluded that to permit Mr. Molzof to recover an amount for future medical expenses in excess of the amount awarded by the district court would be punitive, and would violate the prohibition of "punitive damages" in 28 U.S.C. §2674. 911 F.2d at 20-21.

a. An award of future medical expenses to a veteran with a service-connected disability is not punitive.

The sole basis for the Seventh Circuit's holding that Mr. Molzof was not entitled to recover damages for future medical expenses greater than the amount awarded by the district court was its conclusion that any additional amount would be duplicative and therefore

punitive. The conclusion that any additional damages would be punitive, in turn, rested on that court's definition of "punitive damages" as being those damages in excess of the amount necessary to compensate the claimant for his pecuniary loss. Since, as argued in the previous section of this brief, such a definition of "punitive damages" is contrary to the language of 28 U.S.C. §2674 and inconsistent with the purpose of the Tort Claims Act, this definition is not a valid one. Accordingly, the Seventh Circuit's conclusion that any additional award of future medical expenses was barred by the statute is invalid as well.

As indicated above, the overall purpose of the Tort Claims Act is to hold the United States liable under state law principles to the same extent as a similarly situated private individual, and the provisions of the Act are to be applied in a manner which would accomplish this purpose. However, the Seventh Circuit's denial of an award for additional future medical expenses is directly contrary to this purpose.

It is clear under Wisconsin law that if a defendant is negligent and causes injuries to a plaintiff and those injuries require future medical care, the plaintiff is entitled to recover damages for future medical expenses. More specifically, if a patient brings an action against an admittedly negligent private hospital, the hospital is subject to liability for damages for the patient's future medical expenses. A private hospital cannot eliminate its liability for future medical expenses merely by promising to render future care to the patient, so as to eliminate the patient's right to choose the institution where he will receive care. Yet, the Seventh Circuit essentially held that the Veterans' Administration's promise to provide Mr. Molzof with future medical care under 38 U.S.C. §610 freed it from tort liability for the payment of future

medical expenses, and the court's decision resulted in forcing the claimant to seek medical care from the tortfeasor. This preferential treatment of the United States and the detrimental treatment of tort claimants is not warranted by 28 U.S.C. §2674. An award of damages for future medical expenses in this case would not be "punitive;" making such an award would only result in treating the United States like a private tortfeasor.

The Seventh Circuit's concern that an award of future medical expenses to a veteran who is entitled to receive free medical care at Veterans' Administration facilities would be duplicative and therefore "punitive" does not justify a denial of such an award. Such an award will not conclusively result in a double recovery in every case, because the claimant may not wish to receive medical care from the tortfeasor who caused his injury. In instances where the claimant would choose not to use the Government facilities, no double recovery would occur at all. A claimant certainly should be given an opportunity to make that choice and should not be forced to obtain medical care from the tortfeasor who necessitated the medical care. This is the conclusion reached by several lower federal courts which have considered the issue. *Feeley v. United States*, 337 F.2d 924, 934-35 (3rd Cir. 1964); *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078, 1084 (2nd Cir. 1988); *Powers v. United States*, 589 F.Supp. 1084, 1108 (D.Conn. 1984); *Christopher v. United States*, 237 F.Supp. 787, 798 (E.D.Pa. 1965).

An award of future medical expenses to a veteran who is entitled to receive free medical care is not "punitive" merely because there is a *possibility* that the veteran will seek the free care and thus obtain a duplicate recovery from the damage award. The claimant veteran should be given the *right to choose* between private facilities and Veterans' Administration facilities, and should not be

forced to choose the Veterans' Administration facilities. If the right is exercised and private facilities are chosen, there will be no double recovery.

b. The possibility of a double recovery is a matter for Congress, not the courts.

Although there is a *possibility* that a veteran will choose to seek medical care at Veterans' Administration facilities and that an award for future medical expenses will thereby result in a double recovery, the possibility of a double recovery is permitted by the legislative scheme, as it presently exists. If this possibility is to be eliminated, it is a matter for Congress, not the courts.

Title 38, U.S.C. §610 provides that a veteran with a service-connected disability is entitled to receive free medical care from the Veterans' Administration. The statute does not provide for a denial of care or for an off-set of the cost of the care in the event that the veteran brings a successful claim against the Government under the Federal Tort Claims Act.

Both *Feeley* and *Ulrich* specifically point out the fact that an award of future medical expenses may result in a double recovery, but they note that such a double recovery is allowed under the legislative scheme, unless Congress acts to amend the law. In *Feeley v. United States*, 337 F.2d at 935, the court stated that the mere fact that the plaintiff may decide to seek future care from the Veterans' Administration "should not be a consideration in awarding damages under the Federal Tort Claims Act, but rather is a policy judgment to be made in the administration of veterans' benefits." Similarly, in *Ulrich v. Veterans Administration Hospital*, 853 F.2d at 1078, the court stated:

> [T]he district court's failure to award future medical expenses was erroneous if and to the

> extent it relied on the premise that the VA will provide plaintiff free care in the future. That this might result in a windfall for him is a matter for Congress, not the courts.

Title 38, U.S.C. §610 must be contrasted with 38 U.S.C. §351, which is a statute providing for veterans' disability benefits which specifically deals with the issue of the possible double compensation which could occur if the recipient of benefits brings a Federal Tort Claims action. Section 351 provides that if an individual either receives an award or enters into a settlement in an action under the Federal Tort Claims Act, then disability benefits are to be suspended "until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise." 38 U.S.C. §351. Thus, if a veteran is receiving disability benefits, and he brings a Tort Claims action against the Government and recovers damages for impairment of earning capacity, the disability benefits are suspended until an equivalent amount has been exhausted from the tort recovery.

Congress saw fit not to include a similar type of provision regarding the receipt of medical care from the Government if future medical expenses are awarded in an action under the Federal Tort Claims Act. This lack of and need for Congressional action was specifically noted in *Powers v. United States*, 589 F.Supp. at 1108-09, where the court stated:

> The Court wishes to emphasize, however, that proper Congressional action, such as tying in the set-off provision of 38 U.S.C. §351, *infra*, to the medical treatment available to veterans under 38 U.S.C. §610 *et seq.* would eliminate not only the windfall conundrum which confronts and concerns federal courts under these, or similar circumstances, but also protect the federal

> treasury from the threat of an unnecessary double payment for the same injury.

Title 38, U.S.C. §351 is indicative of the fact that Congress knows how to preclude the possibility of a double recovery for both veterans' benefits and damages in a Federal Tort Claims action. Just as in 38 U.S.C. §351, where Congress set out a scheme to preclude the possibility of a double recovery in a Federal Tort Claims action if the veteran is receiving disability benefits, Congress could also have enacted a similar provision to avoid the potential for a double recovery in a Federal Tort Claims action if the veteran is entitled to receive free future medical care under 38 U.S.C. §610. Congress could have either provided for a suspension of the entitlement to free medical care until such time as the fund established pursuant to the award in the Federal Tort Claims action had been depleted, or, in the alternative, Congress could have provided that the Veterans' Administration would provide the care, but then charge the cost of the care back to the veteran. Such a provision would provide a workable approach to the issue which is present here, would preclude a double recovery for future medical care, and would preserve the claimant's right to choose the facility where he will receive care. However, even though the need for remedial legislation was pointed out by the *Feeley* court in 1964, the *Powers* court in 1984, and the *Ulrich* court in 1988, Congress has not enacted such a provision. In the absence of such a provision, the Seventh Circuit had no right to deny an award of future medical expenses to Mr. Molzof.

c. The remedy provided by the district court is not workable.

The district court determined in this case that the Government was required to bear the expense of Mr.

Molzof's future medical care. However, instead of providing Mr. Molzof with the type of remedy he requested, that is, an award of damages for future medical care, the district court ordered the Government to provide Mr. Molzof with the same level of care he had been receiving at the Veterans' Administration Hospital in Tomah, and to pay him a sum of money to cover the cost of certain additional care which he was not receiving at that hospital – physical therapy, respiratory therapy and doctor's visits. The district court, however, did not explain how such a remedy would be implemented. The remedy is, in fact, unworkable.

The district court directed the Government to provide Mr. Molzof with "reasonable, adequate and necessary" medical care, but failed to state what procedure could be utilized to ensure that Mr. Molzof received such care. In order to ensure that such care would be provided, someone presumably would have had to constantly monitor the care being provided at the Veterans' Administration Hospital. The district court's order failed to specify the remedy which would be available in the event the Veterans' Administration failed to provide "reasonable, adequate and necessary" medical care. For instance, the order did not state where Mrs. Molzof could have gone to enforce the order if she were unsatisfied with the care being provided by the Veterans' Administration or who would determine whether the care received by Mr. Molzof was "reasonable, adequate and necessary." Presumably, if Mrs. Molzof were unsatisfied, she would have had to have gone back to the district court and requested the court to order the Government to provide a better quality of care. She would have had to have done this each and every time that she was not satisfied with the care. In sum, the district court's directive to the Government to provide Mr. Molzof with "reasonable, adequate and necessary" medical care was unworkable.

The district court's directive to the Government to pay for additional aspects of care which Mr. Molzof needed but which were not being provided by the Veterans' Administration was also unworkable. The district court was recognizing the inadequacy of the care provided by the Veterans' Administration and was trying to supplement the care, but it did not provide any direction as to how Mr. Molzof, while hospitalized in a Veterans' Administration facility, was to obtain additional physical therapy, respiratory therapy and additional visits by a doctor. The court awarded Mr. Molzof money to pay for these services, but did not explain how Mrs. Molzof could possibly have brought private physical therapists, respiratory therapists and physicians not employed by the Government into a Government facility to provide care to Mr. Molzof. The court did not explain how physicians and other medical personnel not employed by the Government were to gain access to a Governmental institution.

The district court's attempt to avoid the prospect of a double recovery for future medical expenses was obviously unreasonable and unworkable. There is a workable solution to this problem, but it requires Congressional action which has not taken place.

B. The Question Of Whether Robert Molzof Was Entitled To Recover Damages For Loss Of Enjoyment Of Life Must Be Determined Under Wisconsin Law.

1. Wisconsin has recognized a claim for loss of enjoyment of life.

Wisconsin has long recognized a claim for loss of enjoyment of life. As early as *Benson v. Superior Mfg. Co.*, 147 Wis. 20, 132 N.W. 633 (1911), the Wisconsin Supreme Court recognized this claim. In that case, the court

reviewed the propriety of the trial court instructing the jury on the right to compensation for "deprivation of the pleasures of life." While the court found no error in the use of that terminology, it indicated its preference for the phrase "diminished capacity for enjoying life," indicating that although there was no substantial difference between the two phrases, the preferred one was less likely to be misunderstood. 147 Wis. at 30.

In *Bassett v. Milwaukee N.R. Co.*, 169 Wis. 152, 170 N.W. 944 (1919), the Wisconsin Supreme Court reviewed the propriety of the trial court instructing the jury that they should compensate the plaintiff for "the extent, if any, to which it [the injury] had affected his ability to engage in pastimes." The court stated:

> Having conceded that damages because of "diminished capacity for enjoying life" is proper, we do not appreciate the force of the contention that in awarding damages the jury may not take into consideration "the extent, if any, to which it [the injury] had affected his ability to engage in pastimes." "Diminished capacity for enjoying life" is more comprehensive than "ability to engage in pastimes." Plainly the former includes the latter and more.

169 Wis. at 159.

This principle has been incorporated into the standard jury instructions used in civil cases in Wisconsin. In Wis. J.I. – Civil 1750, the jury is told that in determining what sum of money will fairly and reasonably compensate the plaintiff for personal injuries, the jury should "consider also to what extent his injuries have impaired and will impair his ability to enjoy the normal activities, pleasures, and benefits of life." This language can also be found in Wis. J.I. – Civil 1750A. Wisconsin obviously does not treat damages for loss of enjoyment of life as punitive damages, since the reference to loss of enjoyment of life is included in the instructions on compensatory damages.

The Wisconsin appellate courts have not directly addressed the issue of whether an injured plaintiff can recover for loss of enjoyment of life if he cannot consciously appreciate that loss. In *Benson* and *Bassett*, no limitation was placed on the right to recover for loss of enjoyment of life, and the petitioner submits that under Wisconsin law, a comatose plaintiff has a right to recover for such loss. The district court even noted that Wis. J.I. – Civil 1750 suggests that a claim for such loss is available in Wisconsin. (R. 75:186)

2. An award for loss of enjoyment of life is not precluded by the punitive damage proscription of 28 U.S.C. §2674.

The Seventh Circuit recognized in this case that although Wisconsin has permitted recovery of damages for diminished capacity for enjoying life, the Wisconsin courts have not addressed the question of whether a comatose plaintiff is entitled to recover damages for that loss. The Seventh Circuit held, however, that there was no need for the court to determine how a Wisconsin court would resolve that question, because it concluded that "even if Wisconsin courts recognized the claim for loss of enjoyment of life, in this case it would be barred as punitive under the Federal Tort Claims Act." 911 F.2d at 21.

Like its denial of an award of additional damages for future medical expenses, the Seventh Circuit's denial of an award for loss of enjoyment of life was based upon its definition of "punitive damages" as used in 28 U.S.C. §2674 as being those damages in excess of the amount necessary to compensate the claimant for his pecuniary loss. The Seventh Circuit reasoned that damages for loss of enjoyment of life would be punitive, because Mr. Molzof, being comatose, would not be able to benefit from the money and therefore not be compensated by it.

Since the Seventh Circuit's definition of "punitive damages" is not a valid one, its conclusion that an award of damages for loss of enjoyment of life to a comatose plaintiff is barred as "punitive" is also invalid.

The holding of the Seventh Circuit that an award of damages for loss of enjoyment of life to a comatose plaintiff is punitive in nature and thus not recoverable under the Tort Claims Act demonstrates how inequitable and how impractical the court's definition of "punitive damages" is.

It has been recognized that a claimant who has the ability to appreciate his loss can recover damages for loss of enjoyment of life in an action under the Tort Claims Act. See, e.g., *Burke v. United States*, 605 F.Supp. at 991-92; *Yosuf v. United States*, 642 F.Supp. 432, 439-40 (M.D.Pa. 1986); *Nemmers v. United States*, 681 F.Supp. 567, 573-77 (C.D.Ill. 1988), affirmed, 870 F.2d 426 (7th Cir. 1989); *Andrulonis v. United States*, 724 F.Supp. at 1524-25. For instance, in *Nemmers*, the plaintiff child suffered from severe mental retardation with an IQ of 45, cerebral palsy, an absence of speech capability, hyperactivity and eye problems. The court nevertheless held that an award for loss of enjoyment of life was appropriate, since he was mentally conscious and was capable of some measure of capacity to enjoy life.

An award for loss of enjoyment of life should not be considered compensatory when the plaintiff is consciously aware of his loss, and yet deemed "punitive" and nonrecoverable under the Tort Claims Act if the plaintiff is unaware of his loss. Yet, this is the effect of the Seventh Circuit's definition of "punitive damages." Application of that definition would result in creating a rule that the more severely brain-injured a claimant is and the greater his inability to comprehend his condition, the less he is able to recover. Such a rule would obviously

be inequitable. Application of the Seventh Circuit's definition of "punitive damages" would also be difficult and impractical. In order to determine whether an award of loss of enjoyment of life is compensatory and thus recoverable, or "punitive" and thus nonrecoverable, the federal courts would always have to scrutinize and measure the level of the claimant's awareness. The courts would have to establish a certain level of awareness which would act as a standard for the assessment of the claimant's right to recover damages. Any level of awareness above this standard would entitle the claimant to recover for loss of enjoyment of life, but any claimant with a level of awareness below that standard would not be able to recover such damages because they would be "punitive."

The Seventh Circuit's definition of "punitive damages" as being those damages in excess of the amount necessary to compensate the claimant simply cannot be adopted as a standard for determining what types of damages a claimant is entitled to recover under the Tort Claims Act. That definition should be rejected and instead, the Court should apply the traditional tort definition of "punitive damages." Since an award of damages for loss of enjoyment of life is not intended to punish the Government for the egregious nature of its employees' conduct, but instead is intended to compensate the claimant for his loss, such damages are not prohibited by 28 U.S.C. §2674. Rather, the question of whether a claimant is entitled to recover such damages is to be determined under state law. Accordingly, the question of whether Mr. Molzof was entitled to recover damages for loss of enjoyment of life is a matter to be determined under Wisconsin law.

CONCLUSION

The Seventh Circuit's conclusion that an award of damages for future medical expenses in an amount greater than

the amount awarded by the district court and damages for loss of enjoyment of life would be "punitive" and therefore barred by the proscription of "punitive damages" in 28 U.S.C. §2674 was erroneous.

Therefore, the petitioner respectfully requests the Court to reverse the judgment of the Seventh Circuit. The petitioner requests the Court to remand this case to the United States District Court for the Western District of Wisconsin for the entry of a judgment in the amount of $1,331,649.03, which is the amount found by the district court as being the reasonable cost of medical care needed by Mr. Molzof over his three-year life expectancy, and for the entry of a judgment in the additional amount of $60,000, which is the amount which the district court found would be an appropriate amount of damages for loss of enjoyment of life.

Respectfully submitted,

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APPENDIX

28 U.S.C. §1346(b), United States as defendant

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674, Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been

available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

38 U.S.C. §351, Benefits for persons disabled by treatment or vocational rehabilitation

Where any veteran shall have suffered an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Veterans' Administration, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section

2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

38 U.S.C. §610, Eligibility for hospital, nursing home, and domiciliary care

(a)(1) The Administrator shall furnish hospital care, and may furnish nursing home care, which the Administrator determines is needed –

(A) to any veteran for a service-connected disability;

(B) to a veteran whose discharge or release from the active military, naval, or air service was for a disability incurred or aggravated in line of duty, for any disability;

(C) to a veteran who is in receipt of, or who, but for a suspension pursuant to section 351 of this title (or both such a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such veteran's continuing eligibility for such care is provided for in the judgment or settlement described in such section, for any disability;

(D) to a veteran who has a service-connected disability rated at 50 percent or more, for any disability;

(E) to any other veteran who has a service-connected disability, for any disability;

(F) to a veteran who is a former prisoner of war, for any disability;

(G) to a veteran exposed to a toxic substance or radiation, as provided in subsection (e) of this section;

(H) to a veteran of the Spanish-American War, the Mexican border period, or World War I, for any disability; and

(I) to a veteran for a non-service-connected disability, if the veteran is unable to defray the expenses of necessary care as determined under section 622(a)(1) of this title.

(2)(A) To the extent that resources and facilities are available, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to a veteran for a non-service-connected disability if the veteran has an income level described in section 622(a)(2) of this title.

(B) In the case of a veteran who is not described in paragraph (1) of this subsection or in subparagraph (A) of this paragraph, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to the veteran for a non-service-connected disability –

(i) to the extent that resources and facilities are otherwise available; and

(ii) subject to the provisions of subsection (f) of this section.

(3) In addition to furnishing hospital care and nursing home care described in paragraphs (1) and (2) of this subsection through Veterans' Administration facilities, the Administrator may furnish such hospital care in

accordance with section 603 of this title and may furnish such nursing home care as authorized under section 620 of this title.

(b)(1) The Administrator may furnish to a veteran described in paragraph (2) of this subsection such domiciliary care as the Administrator determines is needed for the purpose of the furnishing of medical services to the veteran.

(2) This subsection applies in the case of the following veterans:

(A) Any veteran whose annual income (as determined under section 503 of this title) does not exceed the maximum annual rate of pension that would be applicable to the veteran if the veteran were eligible for pension under section 521(d) of this title.

(B) Any veteran who the Administrator determines has no adequate means of support.

(c) While any veteran is receiving hospital care or nursing home care in any Veterans' Administration facility, the Administrator may, within the limits of Veterans' Administration facilities, furnish medical services to correct or treat any non-service-connected disability of such veteran, in addition to treatment incident to the disability for which such veteran is hospitalized, if the veteran is willing, and the Administrator finds such services to be reasonably necessary to protect the health of such veteran. The Administrator may furnish dental services and treatment, and related dental appliances, under this subsection for a non-service-connected dental condition or disability of a veteran only (1) to the extent that the Administrator determines that the dental facilities of the

Veterans' Administration to be used to furnish such services, treatment, or appliances are not needed to furnish services, treatment, or appliances for dental conditions or disabilities described in section 612(b) of this title, or (2) if (A) such non-service-connected dental condition or disability is associated with or aggravating a disability for which such veteran is receiving hospital care, or (B) a compelling medical reason or a dental emergency requires furnishing dental services, treatment, or appliances (excluding the furnishing of such services, treatment, or appliances of a routine nature) to such veteran during the period of hospitalization under this section.

(d) In no case may nursing home care be furnished in a hospital not under the direct jurisdiction of the Administrator except as provided in section 620 of this title.

(e)(1)(A) Subject to paragraphs (2) and (3) of this subsection, a veteran –

> (i) who served on active duty in the Republic of Vietnam during the Vietnam era, and
>
> (ii) who the Administrator finds may have been exposed during such service to dioxin or was exposed during such service to a toxic substance found in a herbicide or defoliant used in connection with military purposes during such era, is eligible for hospital care and nursing home care under subsection (a)(1)(G)

of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(B) Subject to paragraphs (2) and (3) of this subsection, a veteran who the Administrator finds was exposed while serving on active duty to ionizing radiation from the detonation of a nuclear device in connection with such veteran's participation in the test of such a device or with the American occupation or Hiroshima and Nagasaki, Japan, during the period beginning on September 11, 1945, and ending on July 1, 1946, is eligible for hospital care and nursing home care under subsection (a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(2) Hospital and nursing home care may not be provided under subsection (a)(1)(G) of this section with respect to a disability that is found, in accordance with guidelines issued by the Chief Medical Director, to have resulted from a cause other than an exposure described in subparagraph (A) or (B) of paragraph (1) of this subsection.

(3) Hospital and nursing home care and medical services may not be provided under or by virtue of subsection (a)(1)(G) of this section after December 31, 1990.

(f)(1) The Administrator may not furnish hospital care or nursing home care under this section to a veteran who is eligible for such care by reason of subsection (a)(2)(B) of this section unless the veteran agrees to pay to the United States the applicable amount determined under paragraph (2) of this subsection.

(2) A veteran who is furnished hospital care or nursing home care under this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such care shall be liable to the United States for an amount equal to the lesser of –

(A) the cost of furnishing such care, as determined by the Administrator; and

(B) the amount determined under paragraph (3) of this subsection.

(3)(A) In the case of hospital care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is –

(i) the amount of the inpatient Medicare deductible, plus

(ii) one-half of such amount for each 90 days of care (or fraction thereof) after the first 90 days of such care during such 365-day period.

(B) In the case of nursing home care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is the amount of the inpatient Medicare deductible for each 90 days of such care (or fraction thereof) during such 365-day period.

(C)(i) Except as provided in clause (ii) of this subparagraph, in the case of a veteran who is admitted for nursing home care under this section after being furnished, during the preceding 365-day period, hospital care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of hospital care in connection with such payment, the veteran shall not

incur any liability under paragraph (2) of this subsection with respect to such nursing home care until –

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(ii) In the case of veteran who is admitted for nursing home care under this section after being furnished, during any 365-day period, hospital care for which the veteran has paid an amount under subparagraph (A)(ii) of this paragraph and who has not been furnished 90 days of hospital care in connection with such payment, the amount of the liability of the veteran under paragraph (2) of this subsection with respect to the number of days of such nursing home care which, when added to the number of days of such hospital care, is 90 or less, is the difference between the inpatient Medicare deductible and the amount paid under such subparagraph until –

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(D) In the case of a veteran who is admitted for hospital care under this section after having been furnished, during the preceding 365-day period, nursing home care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of nursing home care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such hospital care until –

(i) the veteran has been furnished, beginning with the first day of such nursing home care furnished in connection with such payment, a total of 90 days of nursing home care and hospital care; or

(ii) the end of the 365-day period applicable to the nursing home care for which payment was made,

whichever occurs first.

(E) A veteran may not be required to make a payment under this subsection for hospital care or nursing home care furnished under this section during any 90-day period in which the veteran is furnished medical services under section 612(f) of this title to the extent that such payment would cause the total amount paid by the veteran under this subsection for hospital care and nursing home care furnished during that period and under section 612(f)(4) of this title for medical services furnished during that period to exceed the amount of the inpatient Medicare deductible in effect on the first day of such period.

(F) A veteran may not be required to make a payment under this subsection or section 612(f) of this title

for any days of care in excess of 360 days of care during any 365-calendar-day period.

(4) Amounts collected or received on behalf of the United States under this subsection shall be deposited in the Treasury as miscellaneous receipts.

(5) For the purposes of this subsection, the term "inpatient Medicare deductible" means the amount of the inpatient hospital deductible in effect under section 1813(b) of the Social Security Act (42 U.S.C. 1395e(b)) on the first day of the 365-day period applicable under paragraph (3) of this subsection.

(g) Nothing in this section requires the Administrator to furnish care to a veteran to whom another agency of Federal, State, or local government has a duty under law to provide care in an institution of such government.

No. 90-838

In the Supreme Court of the United States

OCTOBER TERM, 1990

SHIRLEY M. MOLZOF, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT E. MOLZOF, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the meaning of the term "punitive damages" in the Federal Tort Claims Act, 28 U.S.C. 2674, is a question of federal law or state law.

2. Whether the prohibition in the Federal Tort Claims Act against the award of "punitive damages," 28 U.S.C. 2674, precludes the award of damages that are not compensatory.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 911 F.2d 18. The memorandum and order of the district court (Pet. App. 26-29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1990. The petition for a writ of certiorari was filed on November 27, 1990, and granted on March 18, 1991. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2674, are reproduced in the appendix to this brief, along with 38 U.S.C. 351 and 610, provisions relating to benefits available to veterans.

STATEMENT

1. Petitioner Shirley Molzof is the personal representative of the estate of Robert E. Molzof, her husband. Mr. Molzof was a veteran suffering from a service-connected disability and, accordingly, he was entitled to receive free medical care from the Veterans Administration (VA) pursuant to 38 U.S.C. 610. Pet. App. 3 n.2. On October 31, 1986, he underwent surgery for removal of the upper right lobe of his lung at the William S. Middleton Memorial Veterans Hospital in Madison, Wisconsin. Following the surgery, Mr. Molzof was temporarily placed on a ventilator. The ventilator's alarm system became disconnected and, while the alarm system was not functioning, the ventilator tube itself became disconnected, causing an interruption in his supply of oxygen. As a result, Mr. Molzof sustained irreversible neurological damage, leaving him permanently and totally comatose. *Id.* at 2. He continued to receive care at the VA Hospital in Tomah, Wisconsin. *Id.* at 26.

2. Mr. Molzof's guardian ad litem filed suit on his behalf under the Federal Tort Claims Act (FTCA) in the United States District Court for the Western District of Wisconsin. Mrs. Molzof also filed suit under the FTCA on her own behalf. The United States admitted liability and, after a trial on the issue of damages, the district court awarded Mr. and

Mrs. Molzof damages totaling $217,950. Mrs. Molzof was awarded $150,000 for past and future loss of consortium. Pet. App. 4, 28. Mr. Molzof was awarded $67,950 for future medical services to supplement the care provided by the VA hospital.[1] Specifically, the supplemental award was intended to provide: (1) physical therapy sessions; (2) respiratory therapy; and (3) weekly visits by a physician. Pet. App. 4, 27, 32. The district court declined to award requested damages for other future medical expenses. It determined that the free care being provided to Mr. Molzof by the VA was reasonable and adequate, that Mrs. Molzof was largely satisfied with that care and had no present intention to transfer Mr. Molzof to a private facility, and that, according to the record, neighboring private hospitals could not provide a comparable level of care. *Id.* at 3, 12-13, 27. The court noted that awarding a higher amount would result in double recovery from the government, and would be punitive. *Id.* at 27.[2] The court also declined to award Mr. Molzof damages for loss of enjoyment of life, reasoning that his condition precluded him even from being aware of such an award or benefiting from it and that such damages would therefore also be punitive in nature. *Id.* at 4, 28. After entry of the district court's final judgment, Mr. Molzof died; Mrs. Molzof, as personal representative of his estate, was substituted as plaintiff. Pet. App. 2 n.1.

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[1] The district court's memorandum and order awarded Mr. Molzof $67,950 for future medical expenses (Pet. App. 27, 29, 32); at a hearing, however, the district court had stated that it would award $75,750 (*id.* at 23), and the court of appeals mistakenly referred to that amount (*id.* at 4).

[2] The recovery of "punitive damages" is not permitted under the FTCA. 28 U.S.C. 2674.

3. The Seventh Circuit affirmed. Pet. App. 1-9. Noting the district court's findings regarding the lack of availability of comparable medical care at private medical facilities and the evidence that Mr. Molzof would not be transferred to a private facility, the court of appeals agreed with the district court that an award of additional damages for future medical expenses would result in double payment by the government for medical expenses. Pet. App. 5-6. Adopting the Fourth Circuit's approach in *Flannery* v. *United States*, 718 F.2d 108, 111 (1983), cert. denied, 467 U.S. 1226 (1984)—the approach followed by "the majority of circuits"—the court of appeals held that an award is "punitive" under the FTCA to the extent that it provides "more than the actual loss suffered by the claimant." Pet. App. 6. Accordingly, the court concluded that an additional award to Mr. Molzof for the expenses of future medical care would violate the FTCA's proscription against punitive damages. *Ibid.* The court emphasized that it was not formulating a broad rule limiting future medical expenses for any veteran entitled to free medical care (*ibid.*); rather, it was relying on the district court's factual determinations "that the Veterans facility provides the best level of care, that it is not in the plaintiff's best interest to be moved, that the plaintiff's wife is satisfied with the level of care, that she has no present intention to transfer the plaintiff, and that the plaintiff's short life span minimizes the likelihood of changed circumstances." *Id.* at 7.

With regard to damages for loss of enjoyment of life, the court of appeals pointed out that Wisconsin courts had not decided "whether a comatose plaintiff, with no conscious awareness of his *complete loss* of enjoyment of life, is entitled to recover damages for

that loss." Pet. App. 7. The court determined, however, that it was unnecessary to predict whether such damages would be recoverable under state law because those damages would, in any event, be barred as punitive under the FTCA. *Id.* at 8. Acknowledging that the Second Circuit had reached a different result in *Rufino* v. *United States*, 829 F.2d 354 (1987), the court agreed with the Fourth Circuit in *Flannery* v. *United States*, *supra*, that an award of damages to a comatose plaintiff for loss of enjoyment of life is necessarily punitive because the award cannot realistically be viewed as compensatory. Pet. App. 8-9. Concluding that "an award of damages for loss of enjoyment of life can in no way recompense, reimburse or otherwise redress a comatose patient's uncognizable loss," the court denied such an award "under the circumstances and findings in this case." *Id.* at 9.

SUMMARY OF ARGUMENT

1. The scope of the prohibition on "punitive damages" in the Federal Tort Claims Act, 28 U.S.C. 2674, is a question of federal law. The FTCA is a limited waiver of sovereign immunity, and the explicit limits on that waiver, such as the exclusion of punitive damages, are a subject of federal interpretation and definition. See, *e.g.*, *Richards* v. *United States*, 369 U.S. 1, 13-14 (1962). The interpretation of "punitive damages" in Section 2674 should not vary from State to State; consistent with congressional intent, the term must be given a uniform federal construction.

2. Punitive damages are damages that are in excess of, or bear no relation to, compensation. At the time of the enactment of the FTCA, the common law interpretation of punitive damages was that they

were damages exceeding, or unrelated to, compensation. The overriding purpose of the FTCA was to provide compensation to victims of torts by government employees, and interpreting punitive damages to mean damages in excess of compensation effectuates that congressional goal. The compensatory purpose of the Act—and the extra-compensatory nature of punitive damages—is also revealed by an amendment to Section 2674 that was added only one year after enactment of the FTCA itself.

Contrary to petitioner's contention, interpreting "punitive damages" in Section 2674 to mean damages in excess of compensation does not create unmanageable administrative difficulties. Although petitioner seeks to present a catalogue of insoluble problems that will purportedly result from such an interpretation, petitioner's examples reflect three basic questions, none of them extraordinarily difficult or complex—(1) excessiveness; (2) duplicativeness; and (3) non-compensability. Petitioner's parade of horribles fails to display issues of unusual difficulty, and fails to provide a justification for rejecting the interpretation of punitive damages that is most consonant with the purpose and scope of the FTCA.

3. With respect to both of the damages claims that petitioner pursues, the lower courts correctly determined that the requested damages would be punitive. With regard to the future medical expenses, the court of appeals' decision is narrowly limited; the court held only that an award of more than $1.3 million for future medical expenses, the amount petitioner seeks, would be punitive because the record in this case established that petitioner would continue to remain at the VA hospital regardless of such an award. Thus, the payment of more than $1.3 million would result

in double payment by the federal government and would serve no compensatory function. With regard to the damages for "loss of enjoyment of life," the lower courts properly determined that the award of such damages to a permanently and totally comatose plaintiff, who would remain unaware of his loss and who could never use or even realize the existence of such an award, would also serve no compensatory function.

ARGUMENT

I. CONGRESS INTENDED A UNIFORM FEDERAL STANDARD TO GOVERN WHETHER DAMAGES ARE "PUNITIVE" WITHIN THE MEANING OF 28 U.S.C. 2674

Petitioner mischaracterizes the FTCA as a statute under which the tort liability of the United States is determined, except in highly unusual circumstances, exclusively by reference to state law. Pet. Br. 7-8, 23-25. On the contrary, although the FTCA incorporates state law as the basic substantive standard for federal tort liability, the Act's numerous exclusions and limitations are all federally defined. Petitioner's interpretation of the exclusion for "punitive damages" in 28 U.S.C. 2674 as a variable standard that changes depending on the law of the State where the claim arises is, in fact, inconsistent with the overall scheme of the statute, which provides uniform federal limitations on Congress's waiver of sovereign immunity.

The starting point for any discussion of the scope of federal liability under the FTCA must be a recognition that the statute is a *limited* waiver of the government's sovereign immunity. *United States* v.

Orleans, 425 U.S. 807, 813 (1976).[3] In enacting the FTCA, Congress "did not assure injured persons damages for all injuries caused by [federal] employees." *Dalehite* v. *United States*, 346 U.S. 15, 17 (1953). Further, in construing the conditions on that waiver, the Court "should not take it upon [itself] to extend the waiver beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979).

The FTCA's basic substantive standard of liability is set forth in 28 U.S.C. 2674, which provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Along with 28 U.S.C. 1346(b), which grants the district courts jurisdiction over claims for property damage, personal injury, or death caused by the negligent or wrongful acts or omissions of federal employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," Section 2674 makes clear that the basic substantive standard for the federal government's liability for the torts of its employees is determined by reference to state law.

Section 2674 not only provides the affirmative statement of the basis for government liability, however; it also contains two significant limitations on the FTCA's waiver of sovereign immunity. The provision specifies that the United States "shall not be liable for interest prior to judgment *or for punitive damages*" (emphasis added). Nothing in the language of the statute links either of these limitations to state law. Moreover, as explicit limitations on the statute's basic waiver of sovereign immunity, these prohibitions should be construed in the same manner as the statute's other explicit conditions on that waiver, which this Court has consistently viewed as imposing uniform federal standards.

In *Richards* v. *United States*, 369 U.S. 1 (1962), this Court recognized that the FTCA contains numerous limitations on the waiver of sovereign immunity that are defined without relation to state law. The specific issue in *Richards* was whether Sections 1346(b) and 2674 require federal courts to apply only the internal law of the relevant State or, instead, to apply the State's whole law, including choice-of-law rules. Noting that nothing in the text of these provisions indicates Congress's intent on this issue (369 U.S. at 10), the Court concluded that the interpretation most consistent with the policies underlying the FTCA was that federal courts must apply the whole law of the State where an FTCA claim arises, including that State's choice-of-law rules. The Court nevertheless recognized that the FTCA contains numerous provisions under which government liability is not coextensive with that of a private person under state law. 369 U.S. at 13-14. The Court specifically noted Section 2674's prohibitions against punitive damages and pre-judgment interest, as well as the federal period of limitations for filing of claims (Section 2401(b)) and the exclu-

[3] Any waiver of sovereign immunity must be construed strictly in the government's favor, *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986), and may not be extended by implication, *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983).

sions for claims arising out of intentional torts (Section 2680(h)), claims arising in a foreign country (Section 2680(k)), and claims based on conduct within the scope of the discretionary function exception and other particular government activities (Section 2680). 369 U.S. at 13-14 n.28. The Court observed that, with respect to these provisions, Congress specifically "intended the federal courts *to depart completely from state law.*" *Id.* at 14 (emphasis added).

Similarly, in *United States* v. *Neustadt*, 366 U.S. 696 (1961), where it considered the scope of the FTCA's exclusion of claims arising out of misrepresentation (Section 2680(h)), the Court made clear that the scope of the exclusion was a matter of federal law. The question in *Neustadt* was whether the exclusion extended to claims arising out of negligent misrepresentation as well as those based on deliberate misrepresentation. Reviewing and rejecting the rationale for the court of appeals' conclusion that Section 2680(h) did not bar recovery for claims based on negligent misrepresentation, the Court noted:

> Whether or not this analysis accords with the law of States which have seen fit to allow recovery under analogous circumstances, it does not meet the question of whether this claim is outside the intended scope of the Federal Tort Claims Act, which depends solely upon what Congress meant by the language it used in § 2680(h).

366 U.S. at 705-706 (footnote omitted). The Court also noted that the FTCA required that the government's liability be determined in accordance with state law "*when a claim is not barred by one of the*

Act's exclusionary provisions," *id.* at 706 n.15 (emphasis added).[4]

Perhaps the most significant limitation on the waiver of sovereign immunity in the FTCA is the so-called discretionary function exception in Section 2680(a). This broad exclusion, described most recently by the Court in *United States* v. *Gaubert*, 111 S. Ct. 1267, 1274 (1991), as immunizing government conduct whenever "established government policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion," has always been interpreted as a uniform federal standard, without reference to state law. Indeed, the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). The lengthy development of the Court's jurisprudence concerning the scope of this important exception, from *Dalehite* v. *United States*, *supra*, to *Gaubert*, has proceeded totally independently of state law.

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[4] Petitioner notes that in *Neustadt* the Court relied, in part, on general principles of tort law in defining the scope of the misrepresentation exception in Section 2680(h). See Pet. Br. 15. The Court explicitly used those principles, however, only as an aid in determining the appropriate federal definition of misrepresentation. 366 U.S. at 705-706. The discussion in *Neustadt* does not support petitioner's suggestion that the meaning of "punitive damages" must be controlled by the law of the particular State where an FTCA claim arises. Moreover, as we explain in Part II below, petitioner's characterization of the common law does not provide an accurate guide to the meaning of "punitive damages" in Section 2674. See pp. 13-15, *infra*.

The rule of *Feres* v. *United States*, 340 U.S. 135 (1950), provides another instance where liability under the FTCA is not defined solely by standards of state law. As the discussion above demonstrates, petitioner errs (see Pet. Br. 24) in discounting *Feres* as an aberrational instance where the government's liability under the FTCA is not coextensive with that of a private individual under state law.

Petitioner also argues that the scope of the FTCA's prohibition against punitive damages must vary State by State to carry out congressional intent to make the United States liable to the same extent as a private individual in like circumstances under state law. Pet. Br. 8, 23-25. This argument ignores, however, this Court's consistent construction of the Act's limitation provisions as imposing uniform federal standards. Neither of the two cases cited by petitioner (Pet. Br. 24) as evidence of a reluctance by the Court to adopt federal standards under the statute concerns any of the Act's explicit limitations on federal liability. In *Richards* v. *United States*, *supra*, as we have already noted, the Court determined that a State's choice-of-law rules were simply part of the State's substantive law to be applied under Sections 1346(b) and 2674. The other case petitioner cites, *Williams* v. *United States*, 350 U.S. 857 (1955), is a two-sentence *per curiam* decision holding that whether a federal employee was "acting within the scope of his office or employment" (Section 1346(b)) was controlled by "the California doctrine of *respondeat superior*" even though the employee involved was an off-duty serviceman.[5] These cases clearly do not in-

[5] The court of appeals in *Williams* had held that although "scope of employment" issues under the FTCA are ordinarily decided by reference to state law, military personnel present a special situation in light of Section 2671, which provides that "acting within the scope of his office or employment" in the case of military personnel means "acting in line of duty." 215 F.2d 800, 807-808 (9th Cir. 1954).

volve, as this one does, explicit statutory limitations on the government's waiver of immunity which, as the Court noted in *Richards*, demonstrate Congress's intent "to depart completely from state law." 369 U.S. at 14.

A uniform federal interpretation of "punitive damages" under Section 2674 is the approach most consistent with this Court's interpretation of the statute's other specific limitations and, as we show below, with its overall purpose.

II. THE PROHIBITION AGAINST "PUNITIVE DAMAGES" BARS DAMAGES AWARDS THAT ARE NOT TRULY COMPENSATORY

A. The Purpose and Scope of the Federal Tort Claims Act Are Compensatory

Petitioner contends that the only reasonable interpretation of the prohibition against "punitive damages" in 28 U.S.C. 2674 is that Congress intended to bar the recovery of damages that are explicitly based on the tortfeasor's culpability or are intended to deter or punish, and therefore are considered punitive under applicable state law. Pet. Br. 7-27. Five courts of appeals, in contrast, have defined "punitive damages" in Section 2674 as those damages that are in excess of, or unrelated to, compensation.[6] As these

[6] See *D'Ambra* v. *United States*, 481 F.2d 14, 17 (1st Cir.), cert. denied, 414 U.S. 1075 (1973); *Flannery* v. *United States*, 718 F.2d 108, 111 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Hartz* v. *United States*, 415 F.2d 259, 264 (5th Cir. 1969); Pet. App. 1-9 (7th Cir. 1990); *Felder* v. *United States*, 543 F.2d 657, 669 (9th Cir. 1976). Other circuits have

courts have found, in light of the purpose and context of the FTCA, the term "punitive damages" refers to damages that are non-compensatory.

Petitioner maintains that a contrary interpretation of "punitive damages" is compelled by the common law understanding of the term and the plain language of Section 2674. Pet. Br. 8-18. Petitioner overlooks the critical fact, however, that "punitive damages" were traditionally considered punitive precisely because they were *in excess of compensation.*[7] As the First Circuit has explained, "[p]unitive damages * * * is that part of the award that is not compensatory; the terms are mutually exclusive." *D'Ambra* v. *United States*, 481 F.2d 14, 17, cert. denied, 414

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reached a contrary conclusion. See *Rufino* v. *United States*, 829 F.2d 354, 362 (2d Cir. 1987); *Kalavity* v. *United States*, 584 F.2d 809, 811 (6th Cir. 1978); *Manko* v. *United States*, 830 F.2d 831, 836 (8th Cir. 1987). See also *Reilly* v. *United States*, 863 F.2d 149, 164-165 (1st Cir. 1988); *Shaw* v. *United States*, 741 F.2d 1202, 1208 (9th Cir. 1984); *Yako* v. *United States*, 891 F.2d 738, 747 (9th Cir. 1989).

[7] See, *e.g.*, W. Prosser, *Handbook of the Law of Torts* § 2 at 12 (1st ed. 1941) (punitive damages "are given to the plaintiff over and above the full compensation for his injuries"); C. McCormick, *Handbook on the Law of Damages* § 77 at 275 (1935) ("The practice of awarding exemplary damages, known also as punitive damages and sometimes as 'smart money,' constitutes an exception to the rule that damages are aimed at compensation."); 1 T. Sedgwick, *A Treatise On The Measure Of Damages* § 357 at 703 (9th ed. 1912) ("[I]t is well settled that when [exemplary damages] are allowed it is in addition to compensatory damages for either physical or mental suffering."). See also *Milwaukee & St. Paul Ry.* v. *Arms*, 91 U.S. 489, 492 (1876) (exemplary damages allow a jury "to go farther" than "full compensatory damages"); *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (punitive damages are "add[ed] to the measured compensation of the plaintiff").

U.S. 1075 (1973). Indeed, the traditional understanding of a tort action was that its function was to *compensate* an individual for his injuries.[8] To be sure, as petitioner points out (Br. 9), the award of punitive damages was typically accompanied by an evaluation of the severity of the defendant's wrongdoing, but petitioner fails to understand that evidence of such wrongdoing was customarily the only *occasion* for awarding damages that were unrelated to—and exceeded—compensation. An essential, defining characteristic of punitive damages was that they were in excess of compensation. It is therefore entirely proper and consistent with this understanding to conclude that Congress, in enacting a statute to provide for compensation, intended for "punitive

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[8] See, *e.g.*, 1 J. Sutherland, *A Treatise on the Law of Damages* § 12 at 47 (4th ed. 1916) ("The universal and cardinal principle is that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation not to be compelled to pay more, except costs."); 1 T. Sedgwick, *supra*, § 29 at 24 (1912) ("Damages consist in compensation for loss sustained."); W. Prosser, *supra*, § 2 at 10 ("The civil action for a tort * * * is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer."). See generally *Carey* v. *Piphus*, 435 U.S. 247, 254-255 (1978) (" 'The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.' ") (quoting 2 F. Harper & F. James, *Law of Torts* § 25.1 at 1299 (1956)); Comment, *Defining Punitive Damages Under The Federal Tort Claims Act*, 53 U. Cin. L. Rev. 251, 260 (1984) ("[T]o claim that compensatory damages can include more than the amount necessary to compensate the victim for his loss is internally inconsistent.").

damages" to refer to those damages that were not compensatory.[9]

The purpose of the FTCA strongly supports the conclusion that punitive damages are those damages that are not compensatory. As the Ninth Circuit recognized in *Felder* v. *United States*, 543 F.2d 657 (1976), "[s]ince the interpretation and application of the Act is a matter of federal law, we look to the purpose of the Act for a definition of punitive." *Id.* at 669 (footnote omitted). This Court has long recognized that the FTCA's purpose is compensatory: "The broad and just purpose which the statute was designed to effect was to *compensate* the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable." *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68-69 (1955) (emphasis added).

The legislative history of the statute, although unrevealing about the precise definition of "punitive damages" in Section 2674, confirms the compensatory goal of the statute. In its report on a predecessor of the bill that was eventually enacted, the House Committee on Claims recommended passage because "[y]our committee feels that it is the essence of jus-

[9] Petitioner repeatedly asserts that damages cannot possibly be "punitive" unless they are measured by the defendant's "culpability." *E.g.*, Pet. Br. 8, 9, 12, 15, 20, 25. Petitioner has it exactly wrong. If damages are unrelated to (or in excess of) compensation and are *not* accompanied by an inquiry into the gravity of the defendant's misconduct, that fact should provide *less* justification for their imposition, not more justification; in petitioner's view, in contrast, the absence of an inquiry into the severity of the defendant's misconduct somehow provides an automatic immunity for the damages as "compensatory" even if they serve no compensatory function.

tice and good administration that such injuries * * * should be promptly *recompensed*." H.R. Rep. No. 1112, 77th Cong., 1st Sess. 2 (1941) (emphasis added). Similarly, in hearings on another predecessor bill, a spokesman for the Attorney General testified that the purpose of such a bill was "to *redress* tortious wrongs arising out of Government activity," adding that "we think it is enough to satisfy the *actual claim*, rather than impose punitive damages on the United States." *Tort Claims: Hearings on H.R. 5375 and H.R. 6463 Before the House Comm. on the Judiciary*, 77th Cong., 2d Sess. 29, 30 (1942) (emphasis added).[10]

Because the goal of the FTCA is the compensation of persons injured by the tortious conduct of government employees, and because damages awards that exceed the level necessary to compensate injured persons for actual losses can have no other function than punishment, the court of appeals here correctly concluded that the prohibition against punitive damages in Section 2674 must be interpreted to bar awards that do not compensate actual losses.

This interpretation is also the most consistent with the language Congress used when it amended the FTCA in 1947 (the year after its enactment), adding the second paragraph of section 2674. This paragraph addressed the problem created by the fact that,

[10] Because the FTCA was the product of consideration in several Congresses, the legislative history of predecessor bills may be instructive in interpreting the statute as enacted in 1946. See, *e.g.*, *Dalehite*, 346 U.S. at 26-30. See also *United States* v. *Spelar*, 338 U.S. 217, 220 n.9 (1949) ("The shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress."); 1 L. Jayson, *Handling Federal Tort Claims* § 59.01 at 2-55 (1991).

in 1947, two States, Alabama and Massachusetts, awarded only punitive damages for wrongful deaths.[11] See *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. 128 (1956). Because of the prohibition against punitive damages in Section 2674, the United States maintained that it was not liable for damages to the survivors of persons who died as a result of government negligence in those States. To remedy this situation, Congress amended the statute to provide that where, in wrongful death cases, applicable state law "provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for *actual or compensatory* damages, measured by the pecuniary injuries resulting from such death * * *." 28 U.S.C. 2674 (emphasis added).

This second paragraph, added just one year after enactment of the FTCA, should be read *in pari materia* with Section 2674's prohibition against punitive damages. *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972).[12] The amendment confirms the compensatory purpose of the statute and demonstrates that Congress intended to define "punitive

[11] Massachusetts revised its statute, effective in 1974, to provide for compensatory damages in wrongful death cases. Mass. Ann. Laws ch. 229, § 2 (Law. Co-op. 1986). See S. Speiser, *Recovery for Wrongful Death* § 3.3 (2d ed. 1975).

[12] In *Erlenbaugh*, the Court specifically noted that "a 'later act can . . . be regarded as a legislative interpretation of [an] earlier act . . . in the sense that it aids in ascertaining the meaning of words as used in their contemporary setting,' and 'is therefore entitled to great weight in resolving any ambiguities and doubts' " 409 U.S. at 243-244 (quoting *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940)).

damages" by contrasting them with "actual or compensatory damages." [13]

Contrary to petitioner's suggestion (Br. 16-18), *Massachusetts Bonding & Ins. Co.* v. *United States*, *supra*, is fully consistent with the government's interpretation of Section 2674. In *Massachusetts Bonding*, the Court considered whether a Massachusetts statute which set a monetary ceiling on punitive dam-

[13] In the second paragraph of Section 2674, Congress provided a specific measure for "actual or compensatory damages" in wrongful death cases (*i.e.*, "the pecuniary injuries resulting from such death") in the two States where the amendment applied. We do not contend that compensatory damages in other kinds of tort suits against the United States in those same States, or in any FTCA actions in other States, are limited by this provision to pecuniary losses. Indeed, the government regularly pays awards of non-pecuniary but nevertheless compensatory damages (such as damages for pain and suffering, loss of consortium, or infliction of emotional distress). By providing a specific measure of damages in the second paragraph of Section 2674, Congress simply filled a "vacuum" of standards for compensation of wrongful death claims in States which permit only punitive damages for that cause of action. In this "vacuum," Congress itself provided a measure for compensatory damages, albeit a stricter one than many States have chosen.

In our view, the only limitation on non-pecuniary awards imposed by Section 2674's prohibition against punitive damages is that such awards may not exceed the claimant's actual loss. The court of appeals here did not conclude otherwise. Although petitioner asserts that the court of appeals "held" that punitive damages under the FTCA are any that exceed the claimant's *pecuniary* loss (Pet. Br. 22), the portion of the Seventh Circuit's opinion quoted by petitioner (Pet. App. 6) purports only to describe the decisions of other courts (as described in a law review commentary). In any event, the court was discussing petitioner's request for future medical expenses, a pecuniary loss; in that context, a damages award in excess of the expected pecuniary loss would not be compensatory, but punitive.

ages in wrongful death cases applied to limit the government's liability for "actual or compensatory" damages in such cases under the second paragraph of Section 2674. The Court held that the limit set by the Massachusetts statute did not address the kind of damages, *i.e.*, compensatory damages, authorized by Section 2674 and that, accordingly, the state statutory limit did not apply to damages under the FTCA. In explaining why the state penal statute had no bearing on recovery in an FTCA suit, the Court observed that "[b]y definition, punitive damages are based upon the degree of the defendant's culpability." 352 U.S. at 133. That statement is by no means inconsistent with the view that damages exceeding the level necessary to make the claimant whole can have no other function than to punish the defendant and thus are punitive in their effect. Indeed, as with the common law understanding of "punitive damages" discussed above, petitioner ignores the fact that the Court also explained that the damages were "punitive" because they were "not compensatory," *id.* at 132; the Court's decision does not support a conclusion that damages may be unrelated to compensation and yet not be punitive.

Determining whether damages are punitive by reference to whether they compensate an actual loss is hardly a novel approach. The concept of liquidated damages in contract law has long incorporated a prohibition against penalties disguised as compensation. Liquidated damages are traditionally defined as a sum which a party to a contract agrees to pay in the event of a breach and which has been "arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach." C. McCormick, *Handbook of the Law of Damages* § 146 at 599 (1935). In contrast, a penalty is a sum

that a party agrees to pay as punishment in the event of a breach. *Id.* at 600. Even if a contract specifies an amount to be paid as "liquidated damages," courts will declare that provision to be an unenforceable penalty if the amount specified is so disproportionate to the foreseeable monetary consequences of a breach that it cannot be viewed as a genuine pre-estimate. *Id.* § 149 at 607. This Court has applied this rule in contract cases. See, *e.g.*, *Kothe* v. *R.C. Taylor Trust*, 280 U.S. 224, 226 (1930); *Wise* v. *United States*, 249 U.S. 361, 365 (1919). Thus, in a different context, this Court has adopted an approach very similar to the one we urge here.

In sum, the purpose and scope of the Federal Tort Claims Act are compensatory; by expressly excluding "punitive damages," Congress limited damage awards under the FTCA to amounts that compensate the plaintiff.

B. Defining "Punitive Damages" As Damages That Are Not Compensatory Does Not Create Unmanageable Administrative Difficulties

Petitioner argues that it is unworkable to define "punitive damages" in Section 2674 as those damages that exceed the level necessary to compensate the claimant for actual losses because application of that definition would require federal courts to make a welter of unusually difficult and burdensome factual determinations. In support of this contention, petitioner provides a long list of cases (Br. 28-30), described as presenting "only a few examples of the types of questions which would arise" (*id.* at 30) if the Court were to adopt this definition. Despite their factual diversity, however, these cases present only three basic questions, none of them substantially dif-

ferent from or more difficult than determinations routinely made by judges and juries in non-FTCA tort cases. The questions are: (1) whether the damages are *excessive* because particular elements exceed the actual losses caused by the tortious conduct, (2) whether the separate elements of damages awarded are *duplicative* of one another or of other government benefits, and (3) whether the damages are awarded for an *inherently non-compensable loss.*

The first of these issues ("excessiveness") is not raised in this case and need not be directly addressed here. We note simply that state law standards for review of damages awards, which typically call for comparison of awards for specific elements of damages to previous awards in similar factual circumstances (see, *e.g.*, *Shaw* v. *United States*, 741 F.2d 1202, 1209-1210 (9th Cir. 1984)), will generally provide appropriate compensatory standards under the FTCA. At some hypothetical extreme, state law could permit damages awards to become so disproportionate to any realistic appraisal of actual loss that they would be considered punitive under Section 2674. Cf. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991) (holding that the common-law method for assessing punitive damages is not *per se* unconstitutional but leaving open the possibility that a particular award could be so excessive as to violate due process). In general, however, state law standards of excessiveness will be sufficient to implement Section 2674's prohibition against punitive damages.

The second of the issues raised by the cases in petitioner's list is whether elements of damages awarded are duplicative of one another or of other government benefits. Concern about duplicative damages under the FTCA is not new to this Court. Less than four years after the statute's enactment, in an FTCA

case concerning wrongful death and injury of military service personnel, the Court observed:

> [W]e now see no indication that Congress meant the United States to pay twice for the same injury. Certain elements of tort damages may be the equivalent of elements taken into account in providing disability payments. It would seem incongruous, at first glance, if the United States should have to pay in tort for hospital expenses it had already paid, for example.

Brooks v. *United States*, 337 U.S. 49, 53-54 (1949). In *Brooks*, the Court upheld the right of servicemen to recover under the FTCA for government negligence unrelated to their military service. The Court remanded the case, however, for consideration of whether, in light of the record, damages should have been reduced by amounts payable "under servicemen's benefit laws." 337 U.S. at 53-54.[14] As in *Brooks*, and contrary to petitioner's suggestion, a concern about imposing duplicative damages on the government is consistent with the compensatory purpose of the Act, and clearly does not pose any insuperable administrative burden.

As petitioner's list reflects, the dual payment issue includes cases concerning deduction of federal income taxes from awards for lost future earnings. The courts of appeals have almost uniformly concluded that the failure to make such a deduction in an FTCA case would violate the prohibition against punitive damages—even if state law does not require such a deduction—because it would provide the claimant with more disposable income than he would

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[14] The Court did not squarely decide the issue, in part because the deductibility of service benefits had not been argued in this Court, nor addressed in the court of appeals. 337 U.S. at 53-54.

have had in the absence of the injury giving rise to the litigation, and because the government, as tax collector and defendant, would be penalized unfairly. See, *e.g.*, *Felder* v. *United States*, 543 F.2d at 669-670; *Flannery* v. *United States*, 718 F.2d at 111-112; *Shaw* v. *United States*, 741 F.2d at 1206-1207; *Hartz* v. *United States*, 415 F.2d 259, 264-265 (5th Cir. 1969); *Harden* v. *United States*, 688 F.2d 1025, 1029-1030 & n.1 (5th Cir. 1982); *O'Connor* v. *United States*, 269 F.2d 578, 584 (2d Cir. 1959). See also *Kalavity* v. *United States*, 584 F.2d 809, 813 (6th Cir. 1978) (income taxes need not be deducted in cases where estimated income is at the "lower or middle reach of the income scale"). But see *Manko* v. *United States*, 830 F.2d 831, 836 (8th Cir. 1987) (declining to deduct federal income taxes). The Ninth Circuit has explained the punitive nature of failing to deduct federal taxes from awards of lost future earnings. If future federal taxes were not deducted from such an award, the government would effectively pay twice—once by losing the tax revenues it would have received from the claimant in the absence of his injury, and again by paying out an equivalent amount as part of the tort judgment. *Felder*, 543 F.2d at 670 n.17. As with the issue of duplicative payments generally, consideration of the deductibility of future federal taxes is both a proper application of the Act and an undertaking well within the competence of federal courts.

The concern with dual payments is that the government—the tortfeasor—should not be required to pay *more* than the amount of the injury that the government caused. Notably, this concern is not implicated by the so-called "collateral source doctrine" under which many States permit full recovery from the tortfeasor even though the injured party is also

compensated for some or all of the same damages by an entirely independent source. See, *e.g.*, *Reilly* v. *United States*, 863 F.2d 149, 165 n.13 (1st Cir. 1988). The rationale of that doctrine is that the tortfeasor should not receive a windfall as a result of his victim's planned or fortuitous eligibility for some other source of compensation. *Ibid.* We do not argue that tort judgments against the United States should be reduced by the amount of benefits received by FTCA claimants from truly *collateral* sources.[15] The question whether one element of damages duplicates another, and therefore exceeds the amount necessary to compensate the claimant's injury, is directed not at whether the government should be permitted to avoid payment altogether because another source of payment exists, but rather at whether the government may be forced to pay *twice* for the same injury. A dual payment situation is punitive because the government is paying for *more* than the injuries caused by its tort; in contrast, application of the collateral

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[15] Private insurance benefits received by an FTCA claimant would fall within this category of collateral sources. See, *e.g.*, *Smith* v. *United States*, 587 F.2d 1013, 1017 (3d Cir. 1978). Some courts of appeals have held that government benefits such as Medicare and Social Security, which are not paid out of the general Treasury but rather out of separate insurance funds to which the claimant has contributed, are collateral sources. See *e.g.*, *Siverson* v. *United States*, 710 F.2d 557, 560 (9th Cir. 1983); *Smith* v. *United States*, 587 F.2d at 1016. Accordingly, damages awards under the FTCA are not reduced by these benefits even if they cover the same medical care or other costs compensated by the tort judgment against the United States. See also *Overton* v. *United States*, 619 F.2d 1299, 1308 (8th Cir. 1980) (Medicare payment, from a fund to which the claimant did not contribute, was not from a collateral source, and thus should be deducted from the damages award).

source doctrine is not punitive because the tortfeasor only pays once for the injury it caused. And, again, whether the elements of damages awarded in an FTCA case are duplicative of one another or of other government benefits is a factual issue no more complex or difficult than other factual questions that trial courts routinely confront in determining the appropriate level of compensatory damages in tort cases.

The third of the questions raised in petitioner's list of cases is whether damages are awarded for an inherently non-compensable loss. Although the fact situation in this case, involving a claim for damages for loss of enjoyment of life by a comatose plaintiff, does indeed present the issue, whether an injury is inherently non-compensable will not arise frequently. Despite the fact that cases presenting the issue are unusual, however, they do not demand determinations radically different from those required by the application of other, well-recognized tort doctrines. Perhaps the closest analogy is to claims by survivors for the pain and suffering of deceased family members under state survival statutes. Such statutes typically permit recovery by the decedent's personal representatives for damages that the *decedent* could have recovered had he lived. See S. Speiser, *Recovery for Wrongful Death* § 14:1 at 410 (2d ed. 1975).[16] In actions under state survival statutes in which damages for pain and suffering of the decedent are recoverable, there must be evidence of *conscious* pain and suffering by the decedent. *Id.* § 14.10 at 435-436. A rule re-

[16] Such survival statutes are different from wrongful death statutes, which provide survivors (or the decedent's estate) with a remedy for losses *they* have sustained as a result of the decedent's death. See S. Speiser, *supra*, § 14:1 at 410.

quiring some degree of consciousness by the claimant in an FTCA case as a predicate to recovery for loss of enjoyment of life is no more unusual or difficult to apply than the similar requirement of consciousness routinely imposed as a limitation on pain-and-suffering damages in actions under state survival statutes.[17] Its application might require a bright line demarcation between totally comatose claimants and all others, [18] but such a rule is by no means impracticable, as petitioner suggests.

Thus, in addition to being consistent with the compensatory purpose of the FTCA, interpreting the prohibition against punitive damages in 28 U.S.C. 2674 to preclude damages awards that exceed the level necessary to compensate the claimant for his actual losses—and therefore barring recovery of damages for future nonpecuniary loss by unconscious claim-

[17] Indeed, although most States permit consideration of loss of enjoyment of life in determining the tort damages of non-comatose victims, the majority of States treat it not as a separate element of damages but rather as part of a general award for pain and suffering. Comment, *Loss of Enjoyment of Life as a Separate Element of Damages*, 12 Pac. L.J. 965, 967 (1981). See, *e.g.*, *McDougald* v. *Garber*, 73 N.Y.2d 246, 255-257, 536 N.E. 2d 372, 375-376, 538 N.Y.S.2d 937, 940-942 (1989); *Huff* v. *Tracy*, 57 Cal. App. 3d 939, 129 Cal. Rptr. 551 (1976).

[18] See, *e.g.*, *McDougald* v. *Garber*, *supra*. In *McDougald*, the New York Court of Appeals ruled that a comatose plaintiff could not recover damages for loss of enjoyment of life under New York law. The court held that the plaintiff must retain "some level of awareness" to recover for any aspect of nonpecuniary loss. It concluded that this bright line rule would mean that fact finders were not required "to sort out varying degrees of cognition and determine at what level a particular deprivation can be fully appreciated." 73 N.Y. 2d at 940, 536 N.E.2d at 374, 538 N.Y.S. 2d at 255.

ants, as well as awards for elements of damages duplicative of one another or of other governmental benefits—provides a workable rule for the federal courts to apply.

III. THE COURT OF APPEALS CORRECTLY DENIED DAMAGES FOR FUTURE MEDICAL EXPENSES AND FOR LOSS OF ENJOYMENT OF LIFE ON THE GROUND THAT SUCH DAMAGES WERE "PUNITIVE" WITHIN THE MEANING OF 28 U.S.C. 2674

A. Additional Damages For Future Medical Expenses Would Duplicate Other Government Payments And Serve No Compensatory Function

The court of appeals concluded that damages for future medical expenses beyond those necessary to supplement the care Mr. Molzof was receiving in the VA hospital would result in double payment by the federal government and would accordingly be punitive. Pet. App. 5-7. That conclusion was based on the particular facts of this case and establishes no broad rule concerning the availability under the FTCA of damages for future medical expenses to veterans eligible for free medical care from the VA.

Petitioner's position, in contrast, is that Mr. Molzof was entitled to more than $1.3 million for future medical care even though the record in this case established that the money would not be used for future medical expenses, even though the government was already paying for petitioner's future medical expenses, and even though Mr. Molzof received an additional $67,950 to supplement his future medical care. Pet. Br. 36-45. An award of more than $1.3 million in such circumstances could only be characterized as punitive; on this record, it clearly would not be compensatory.

The court of appeals determined, on the basis of factual findings by the district court, that the VA hospital where Mr. Molzof was receiving care provided the best level of care available; that it was not in his best interest to be moved; that Mrs. Molzof was satisfied with the level of care that he was receiving and had no present intention to transfer him to a private facility; and that Mr. Molzof's short life expectancy minimized the likelihood that these circumstances would change. Pet. App. 7. The court of appeals accordingly agreed with the district court that an award for future medical expenses (beyond the supplemental award of $67,950) would result in double payment with a punitive effect. *Id.* at 6-7.

In reaching that conclusion, the court of appeals took pains to explain that it was not disagreeing with the decisions in *Ulrich* v. *Veterans Admin. Hosp.*, 853 F.2d 1078 (2d Cir. 1988), and *Feeley* v. *United States*, 337 F.2d 924 (3d Cir. 1964). In those cases, the courts held that an FTCA plaintiff eligible for free VA medical care was entitled to an award for future medical expenses to permit him to choose whether he wished to continue to obtain such care from the VA. The court of appeals here stated that it agreed with *Ulrich* and *Feeley* that the availability of free medical care to a veteran does not automatically limit an FTCA award for future medical expenses. Pet. App. 6-7. The court stressed, however, that the record in this case established no likelihood that Mr. Molzof would transfer to a private facility, and thus no reason to believe that an award for future medical expenses (beyond that awarded to supplement the care at the VA hospital) would actually be used for such expenses. *Id.* at 7. The court thus agreed with the general principle in *Ulrich* and *Feeley* and carefully distinguished the facts of this case.

Petitioner complains that the court of appeals' decision gives the United States "preferential treatment" because a private hospital in Wisconsin cannot escape tort liability to a patient injured as a result of the hospital's negligence "merely by promising to render future care to the patient." Br. 39-40. At the outset, petitioner's statement (which includes no citations to Wisconsin cases or statutes) is a non sequitur for two reasons. First, this case does not involve a mere "promis[e]" of future care; it concerns the federal government's actual provision of the care. Second, and more fundamentally, petitioner's analogy ignores the district court's factual finding, which specifies that, so far as appears from the record, no other hospital in the area could provide comparable care. Pet. App. 27.

Even if petitioner's statement of Wisconsin law were correct and apropos, however, the fact that the FTCA does not always place the government in precisely the same position as a private tortfeasor has been acknowledged by this Court. See, *e.g.*, *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. at 133-134 (holding that by adopting a specific measure of compensatory damages in the second paragraph of 28 U.S.C. 2674, Congress "deliberately chose" to permit "substantial differences in recovery to exist" between wrongful death suits against the government and such suits against private defendants in States covered by that provision). The prohibition against punitive damages in Section 2674 is, by its very nature, a limitation on federal liability that does not apply in suits against private individuals under state law.

Petitioner also claims (Br. 41-43) that if Congress had intended to prohibit double payment in these circumstances, it would have included an explicit provision to that effect, as in 38 U.S.C. 351. But 38 U.S.C. 351 concerns the payment of VA disability benefits: it provides for a set-off, against future VA disability benefits, of any judgment or settlement of an FTCA claim arising from injuries suffered or aggravated as a result of hospitalization, medical or surgical treatment, or vocational rehabilitation provided by the VA. Section 351 thus exclusively addresses circumstances in which, by definition, VA benefits and FTCA malpractice damages overlap.

In contrast, 38 U.S.C. 610 (under which Mr. Molzof was eligible for free medical care) concerns the general eligibility of veterans for hospitalization and nursing care. Section 610 thus has a far broader scope than Section 351 and applies in many circumstances in which the issue of double recovery is not pertinent. That Congress did not explicitly provide for a set-off of FTCA damages against the medical benefits provided under 38 U.S.C. 610 thus does not establish that Congress intended to provide double recovery from the government for tort plaintiffs who will receive such medical benefits.

The court of appeals' refusal to award damages for future medical expenses (other than those necessary to supplement the care being provided by the VA hospital) was not based on a speculative possibility. Rather that decision was based on a careful reading of the record supporting the district court's factual finding that any other result was extremely unlikely. The court's essentially factual determination was no different from many other predictive judgments courts make in determining the appropriate level of damages to compensate tort plaintiffs for actual losses, *e.g.*, the plaintiff's life expectancy, his future earning capacity, or his future medical needs. Having concluded that an award of additional

damages to Mr. Molzof for future medical expenses would result in double payment by the government for the same losses, the court properly determined that such damages would be punitive within the meaning of 28 U.S.C. 2674. Petitioner's position—that Mr. Molzof was entitled to more than $1.3 million for future medical expenses even though the record established that the money would not be used for that purpose and even though the federal government would be separately paying for all of his future medical expenses—cannot be reconciled with the compensatory purpose of the Federal Tort Claims Act.[19]

B. Damages For Loss Of Enjoyment Of Life To A Comatose Claimant Are Necessarily Punitive In Their Effect

Petitioner also challenges the court of appeals' rejection of the request for damages based on loss of enjoyment of life. However, the court of appeals correctly determined that providing such an award—which the district court found would be no more than $60,000, if permitted (Pet. App. 28)—to a permanently and totally comatose plaintiff, such as Mr. Molzof, would be punitive, rather than compensatory.

Damages for the loss of enjoyment of life are intended to compensate a plaintiff for the deprivation of life's pleasures. They are intended to provide a plaintiff with solace for what he has lost. See generally Comment, *Loss of Enjoyment of Life as a*

[19] Petitioner suggests (Br. 43-45) that the district court's order providing for the supplementation of medical care would have been unenforceable, but we are confident that the parties could have reached a resolution faithfully implementing the district court's order. In any event, the issue was rendered hypothetical by Mr. Molzof's death.

Separate Element of Damages, 12 Pac. L.J. at 972-973. A permanently and totally comatose plaintiff, however, has no awareness or cognition of his loss. Accordingly, an award of damages for loss of enjoyment of life can serve no compensatory purpose. As the Fourth Circuit has explained:

> [The plaintiff] is conscious of nothing and incapable of enjoying anything. * * * There is no likelihood whatever that he will ever become aware of anything.
>
> * * * It is perfectly clear * * * that an award of $1,300,000 for the loss of enjoyment of life cannot provide him with any consolation or ease any burden resting upon him. * * * He cannot use the $1,300,000. He cannot spend it upon necessities or pleasures. He cannot experience the pleasure of giving it away.

Flannery, 718 F.2d at 111.[20]

Petitioner does not explain how such an award is conceivably compensatory. Instead, petitioner relies on the general proposition, previously explored, that the damages cannot be considered punitive because they are not so characterized by state law and because they are not measured by the defendant's culpability. Pet. Br. 49.[21] The problems with petitioner's

[20] See also *McDougald* v. *Garber*, 73 N.Y.2d at 254, 536 N.E.2d at 375, 538 N.Y.S.2d at 940 ("The question posed by this case * * * is whether an award of damages for loss of enjoyment of life to a person whose injuries preclude any awareness of the loss serves a compensatory purpose. We conclude that it does not. Simply put, an award of money damages in such circumstances has no meaning or utility to the injured person.").

[21] With regard to state law, the court of appeals observed (Pet. App. 7), and petitioner concedes (Pet. Br. 47), that Wisconsin appellate courts have not addressed the question

approach have been discussed, but petitioner's reliance on that general proposition cannot mask the conspicuous absence of any explanation as to how an award of damages for loss of enjoyment of life may be considered compensatory when made to a permanently and totally comatose plaintiff.

Indeed, petitioner's position with respect to these damages exposes the central flaw in petitioner's argument. The burden of petitioner's position is that no damages may be excluded as "punitive damages" under the explicit command of Section 2674, even if they are wildly in excess of an amount that would compensate the plaintiff or bear no relation to compensation, so long as they are not characterized as "punitive" by state law (and, apparently, measured by the defendant's culpability). Such a position conflicts with the fundamental purpose of the FTCA—

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whether state law permits recovery of damages for loss of enjoyment of life by a comatose tort plaintiff. Petitioner nevertheless asserts that "under Wisconsin law, a comatose plaintiff has a right to recover for such loss." Pet. Br. 47. Although the issue need not be decided, we note that we disagree with petitioner's reading of Wisconsin law. Wisconsin has long recognized loss of enjoyment of life as a separate element of tort damages. See *Benson* v. *Superior Mfg. Co.*, 147 Wis. 20, 132 N.W. 633 (1911); *Bassett* v. *Milwaukee N. Ry.*, 169 Wis. 152, 170 N.W. 944 (1919). Neither *Benson* nor *Bassett*, however, casts any light on whether conscious awareness by the plaintiff is a necessary component of proof of that element of damages. But Wisconsin does not permit a plaintiff in a survival action to recover damages for the decedent's loss of enjoyment of life, specifically because such an award would violate the basic principle that tort damages are compensatory. See *Prunty* v. *Schwantes*, 40 Wis. 2d 418, 424, 162 N.W.2d 34, 38 (1968). By similar reasoning, it is also punitive rather than compensatory to award damages for loss of enjoyment of life to a permanently comatose plaintiff.

compensation—and with its carefully sculpted limitations to serve that purpose. Under a correct interpretation of the FTCA, Section 2674 excludes those damages that are not compensatory. Because the award of damages for loss of enjoyment of life to a permanently and totally comatose plaintiff, like the recovery of double payment from the government for future medical expenses, is not compensatory, it is punitive and thus barred by the terms of Section 2674.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Federal Tort Claims Act, 28 U.S.C. 1346 and 2674, provides in pertinent part:

§ 1346. United States as defendant

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or

omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

2. Sections 351 and 610, 38 U.S.C., provide:

§ 351. Benefits for persons disabled by treatment or vocational rehabilitation

Where any veteran shall have suffered an injury, or aggravation of an injury, as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation under chapter 31 of this title, awarded under any of the laws administered by the Vet-

erans' Administration, or as a result of having submitted to an examination under any such law, and not the result of such veteran's own willful misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, disability or death compensation under this chapter and dependency and indemnity compensation under chapter 13 of this title shall be awarded in the same manner as if such disability, aggravation, or death were service-connected. Where an individual is, on or after December 1, 1962, awarded a judgment against the United States in a civil action brought pursuant to section 1346(b) of title 28 or, on or after December 1, 1962, enters into a settlement or compromise under section 2672 or 2677 of title 28 by reason of a disability, aggravation, or death treated pursuant to this section as if it were service-connected, then no benefits shall be paid to such individual for any month beginning after the date such judgment, settlement, or compromise on account of such disability, aggravation, or death becomes final until the aggregate amount of benefits which would be paid but for this sentence equals the total amount included in such judgment, settlement, or compromise.

§ 610. Eligibility for hospital, nursing home, and domiciliary care

(a)(1) The Administrator shall furnish hospital care, and may furnish nursing home care, which the Administrator determines is needed—

(A) to any veteran for a service-connected disability;

(B) to a veteran whose discharge or release from the active military, naval, or air service was for a disability incurred or aggravated in line of duty, for any disability;

(C) to a veteran who is in receipt of, or who, but for a suspension pursuant to section 351 of this title (or both such a suspension and the receipt of retired pay), would be entitled to disability compensation, but only to the extent that such veteran's continuing eligibility for such care is provided for in the judgment or settlement described in such section, for any disability;

(D) to a veteran who has a service-connected disability rated at 50 percent or more, for any disability;

(E) to any other veteran who has a service-connected disability, for any disability;

(F) to a veteran who is a former prisoner of war, for any disability;

(G) to a veteran exposed to a toxic substance or radiation, as provided in subsection (e) of this section;

(H) to a veteran of the Spanish-American War, the Mexican border period, or World War I, for any disability; and

(I) to a veteran for a non-service-connected disability, if the veteran is unable to defray the expenses of necessary care as determined under section 622(a)(1) of this title.

(2)(A) To the extent that resources and facilities are available, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to a veteran for a non-service-connected disability if the veteran has an income level described in section 622(a)(2) of this title.

(B) In the case of a veteran who is not described in paragraph (1) of this subsection or in subparagraph (A) of this paragraph, the Administrator may furnish hospital care and nursing home care which the Administrator determines is needed to the veteran for a non-service-connected disability—

(i) to the extent that resources and facilities are otherwise available; and

(ii) subject to the provisions of subsection (f) of this section.

(3) In addition to furnishing hospital care and nursing home care described in paragraphs (1) and (2) of this subsection through Veterans' Administration facilities, the Administrator may furnish such hospital care in accordance with section 603 of this title and may furnish such nursing home care as authorized under section 620 of this title.

(b)(1) The Administrator may furnish to a veteran described in paragraph (2) of this subsection such domiciliary care as the Administrator determines is needed for the purpose of the furnishing of medical services to the veteran.

(2) This subsection applies in the case of the following veterans:

(A) Any veteran whose annual income (as determined under section 503 of this title) does not exceed the maximum annual rate of pension that would be applicable to the veteran if the veteran were eligible for pension under section 521(d) of this title.

(B) Any veteran who the Administrator determines has no adequate means of support.

(c) While any veteran is receiving hospital care or nursing home care in any Veterans' Administration facility, the Administrator may, within the limits of Veterans' Administration facilities, furnish medical services to correct or treat any non-service-connected disability of such veteran, in addition to treatment incident to the disability for which such veteran is hospitalized, if the veteran is willing, and the Administrator finds such services to be reasonably necessary to protect the health of such veteran. The Administrator may furnish dental services and treatment, and related dental appliances, under this subsection for a non-service-connected dental condition or disability of a veteran only (1) to the extent that the Administrator determines that the dental facilities of the Veterans' Administration to be used to furnish such services, treatment, or appliances are not needed to furnish services, treatment, or appliances for dental conditions or disabilities described in section 612(b) of this title, or (2) if (A) such non-service-connected dental condition or disability is associated with or aggravating a disability for which such veteran is receiving hospital care, or (B) a compelling medical reason or a dental emergency requires furnishing dental services, treatment, or appliances (excluding the furnishing of such services, treatment, or appliances of a routine nature) to such veteran during the period of hospitalization under this section.

(d) In no case may nursing home care be furnished in a hospital not under the direct jurisdiction of the Administrator except as provided in section 620 of this title.

(e)(1)(A) Subject to paragraphs (2) and (3) of this subsection, a veteran—

(i) who served on active duty in the Republic of Vietnam during the Vietnam era, and

(ii) who the Administrator finds may have been exposed during such service to dioxin or was exposed during such service to a toxic substance found in a herbicide or defoliant used in connection with military purposes during such era,

is eligible for hospital care and nursing home care under subsection (a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(B) Subject to paragraphs (2) and (3) of this subsection, a veteran who the Administrator finds was exposed while serving on active duty to ionizing radiation from the detonation of a nuclear device in connection with such veteran's participation in the test of such a device or with the American occupation of Hiroshima and Nagasaki, Japan, during the period beginning on September 11, 1945, and ending on July 1, 1946, is eligible for hospital care and nursing home care under subsection (a)(1)(G) of this section for any disability, notwithstanding that there is insufficient medical evidence to conclude that such disability may be associated with such exposure.

(2) Hospital and nursing home care may not be provided under subsection (a)(1)(G) of this section with respect to a disability that is found, in accordance with guidelines issued by the Chief Medical Director, to have resulted from a cause other than an exposure described in subparagraph (A) or (B) of paragraph (1) of this subsection.

(3) Hospital and nursing home care and medical services may not be provided under or by virtue of subsection (a)(1)(G) of this section after December 31, 1990.

(f)(1) The Administrator may not furnish hospital care or nursing home care under this section to a veteran who is eligible for such care by reason of subsection (a)(2)(B) of this section unless the veteran agrees to pay to the United States the applicable amount determined under paragraph (2) of this subsection.

(2) A veteran who is furnished hospital care or nursing home care under this section and who is required under paragraph (1) of this subsection to agree to pay an amount to the United States in order to be furnished such care shall be liable to the United States for an amount equal to the lesser of—

(A) the cost of furnishing such care, as determined by the Administrator; and

(B) the amount determined under paragraph (3) of this subsection.

(3)(A) In the case of hospital care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is—

(i) the amount of the inpatient Medicare deductible, plus

(ii) one-half of such amount for each 90 days of care (or fraction thereof) after the first 90 days of such care during such 365-day period.

(B) In the case of nursing home care furnished during any 365-day period, the amount referred to in paragraph (2)(B) of this subsection is the amount of the inpatient Medicare deductible for each 90 days of such care (or fraction thereof) during such 365-day period.

(C)(i) Except as provided in clause (ii) of this subparagraph, in the case of a veteran who is admitted for nursing home care under this section after being furnished, during the preceding 365-day period, hospital care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of hospital care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such nursing home care until—

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(ii) In the case of a veteran who is admitted for nursing home care under this section after being furnished, during any 365-day period, hos-

pital care for which the veteran has paid an amount under subparagraph (A)(ii) of this paragraph and who has not been furnished 90 days of hospital care in connection with such payment, the amount of the liability of the veteran under paragraph (2) of this subsection with respect to the number of days of such nursing home care which, when added to the number of days of such hospital care, is 90 or less, is the difference between the inpatient Medicare deductible and the amount paid under such subparagraph until—

(I) the veteran has been furnished, beginning with the first day of such hospital care furnished in connection with such payment, a total of 90 days of hospital care and nursing home care; or

(II) the end of the 365-day period applicable to the hospital care for which payment was made,

whichever occurs first.

(D) In the case of a veteran who is admitted for hospital care under this section after having been furnished, during the preceding 365-day period, nursing home care for which the veteran has paid the amount of the inpatient Medicare deductible under this subsection and who has not been furnished 90 days of nursing home care in connection with such payment, the veteran shall not incur any liability under paragraph (2) of this subsection with respect to such hospital care until—

(i) the veteran has been furnished, beginning with the first day of such nursing

home care furnished in connection with such payment, a total of 90 days of nursing home care and hospital care; or

(ii) the end of the 365-day period applicable to the nursing home care for which payment was made,

whichever occurs first.

(E) A veteran may not be required to make a payment under this subsection for hospital care or nursing home care furnished under this section during any 90-day period in which the veteran is furnished medical services under section 612(f) of this title to the extent that such payment would cause the total amount paid by the veteran under this subsection for hospital care and nursing home care furnished during that period and under section 612(f)(4) of this title for medical services furnished during that period to exceed the amount of the inpatient Medicare deductible in effect on the first day of such period.

(F) A veteran may not be required to make a payment under this subsection or section 612(f) of this title for any days of care in excess of 360 days of care during any 365-calendar-day period.

(4) Amounts collected or received on behalf of the United States under this subsection shall be deposited in the Treasury as miscellaneous receipts.

(5) For the purposes of this subsection, the term "inpatient Medicare deductible" means the amount of the inpatient hospital deductible in effect under section 1813(b) of the Social Security Act (42 U.S.C. 1395e(b)) on the first day

of the 365-day period applicable under paragraph (3) of this subsection.

(g) Nothing in this section requires the Administrator to furnish care to a veteran to whom another agency of Federal, State, or local government has a duty under law to provide care in an institution of such government.

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No. 90-838

In The

Supreme Court of the United States

October Term, 1990

SHIRLEY M. MOLZOF, as personal representative of the Estate of ROBERT E. MOLZOF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. THE TERM "PUNITIVE DAMAGES" AS USED IN 28 U.S.C. §2674 MUST BE INTERPRETED IN ACCORDANCE WITH TRADITIONAL TORT PRINCIPLES TO MEAN THOSE DAMAGES WHICH ARE BASED ON THE CULPABILITY OF THE TORTFEASOR'S CONDUCT AND ARE INTENDED TO ACT AS PUNISHMENT FOR THAT CONDUCT.

A. The Fact That The Interpretation Of The Prohibition Of "Punitive Damages" In 28 U.S.C. §2674 Is A Matter Of Federal Law Does Not Preclude The Court From Taking Into Consideration The Traditional Tort Concept Of Punitive Damages.

The respondent mischaracterizes the petitioner's interpretation of the prohibition of "punitive damages" in 28 U.S.C. §2674 as being "a variable standard that changes depending on the law of the State where the claim arises." Resp. Br. 7. To the contrary, it is the position of the petitioner that the term "punitive damages" should be interpreted in accordance with the traditional tort view of punitive damages as being those damages which are based on the culpability of the tortfeasor's conduct and which are meant to punish the tortfeasor for that conduct. This interpretation of "punitive damages" would not vary in accordance with state law, but would be uniform in each case.

The petitioner realizes that the interpretation of the term "punitive damages" is a matter of federal law. However, that fact does not preclude the Court from considering traditional tort law in interpreting that term. The respondent would have the Court believe that because

the interpretation of "punitive damages" has to be a uniform federal one, the Court must completely ignore traditional tort concepts and create a definition of "punitive damages" which is totally separate from, and even inconsistent with, traditional tort law. This is not necessary. It is perfectly proper for this Court to consider traditional tort concepts when interpreting a provision of the Federal Tort Claims Act, *United States v. Orleans*, 425 U.S. 807 (1976); *Logue v. United States*, 412 U.S. 521 (1973); *United States v. Neustadt*, 366 U.S. 696 (1961); *Williams v. United States*, 350 U.S. 857 (1955), and it is perfectly proper for the Court to assume that in prohibiting "punitive damages," Congress had a traditional tort definition in mind. *United States v. Neustadt*, 366 U.S. at 706-08.

Several courts of appeal have relied on traditional tort principles in interpreting the prohibition against "punitive damages." *Rufino v. United States*, 829 F.2d 354, 362 (2nd Cir. 1987); *Kalavity v. United States*, 584 F.2d 809, 811 (6th Cir. 1978) ("In excluding 'punitive' damages from the coverage of the Tort Claims Act, we believe that Congress simply prohibited use of a retributive theory of punishment against the government, not a theory of damages which would exclude all customary damages awarded under traditional tort law principles which mix theories of compensation and deterrence together."); *Manko v. United States*, 830 F.2d 831, 836 (8th Cir. 1987) ("We conclude that Congress did not mean to outlaw all variations from some ideal norm of compensation when it forbade 'punitive damages.' It was referring only to that concept in its traditional sense.") See also: *Shaw v. United States*, 741 F.2d 1202, 1208 (9th Cir. 1984); *Yako v. United States*, 891 F.2d 738, 747 (9th Cir. 1989).

The respondent even acknowledges in a footnote that in *United States v. Neustadt, supra,* this Court relied on general principles of tort law as an aid in determining the appropriate federal definition of "misrepresentation" for purposes of 28 U.S.C. §2680(h). Resp. Br. 11, fn. 4. The petitioner is only asking the Court to do the same here.

B. The Traditional View Of Punitive Damages Is That They Are Damages Which Are Based On The Culpability Of The Tortfeasor's Conduct And Are Intended To Act As Punishment For That Conduct.

The respondent argues that if the Court were to accept the traditional tort concept of punitive damages as a definition of "punitive damages" for the purpose of 28 U.S.C. §2674, this would not result in an acceptance of the petitioner's position, because punitive damages were traditionally considered those damages which were in excess of compensation. Resp. Br. 13-16. It is the respondent, however, not the petitioner, who has misunderstood the traditional concept of punitive damages.

Punitive damages have always been viewed as those damages which are awarded as punishment for the culpability of the tortfeasor's conduct. Contrary to the respondent's statement on page 15 of its brief, an award of punitive damages was not merely "accompanied" by an evaluation of the severity of the tortfeasor's wrongdoing, but rather, a *necessary prerequisite* of an award of punitive damages was that the tortfeasor's conduct must have been outrageous, malicious or actuated by ill will. Because punitive damages are awarded for the purpose of punishing the tortfeasor for egregious conduct, they

are necessarily non-compensatory. Because punitive damages are awarded only after compensatory damages are awarded, they obviously exceed the amount necessary to compensate the claimant. However, the mere fact that punitive damages exceed compensatory damages does not mean that punitive damages are *any* damages which are in excess of compensation. Punitive damages are those damages which are awarded only when it has been shown that the tortfeasor's conduct is deserving of punishment.

Even the authorities which respondent quotes in footnote 7 of its brief state that punitive damages are dependent upon the aggravative nature of the tortfeasor's conduct and are awarded to punish that conduct.

> Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages, or what is sometimes called "smart money." Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example. *Something more than the mere commission of a tort is always required for punitive damages: there must be circumstances of aggravation or outrage, such as ill will or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called wilful or wanton.* . . . [I]t is not so much the particular tort

> committed as the defendant's motives and conduct in committing it which will be important as the basis of the award.

(Emphasis supplied.) W. Prosser, *Handbook of the Law of Torts*, §2, pp. 11-14 (1941).

> In the case of most torts, ill will, evil motive, or consciousness of wrongdoing on the part of the tort-feasor are not at all essential to render the conduct actionable; that is, to render him responsible for damages, actual or nominal. . . . As to the recovery of exemplary damages, however, the situation is quite different, and it is this difference that constitutes the most important distinctive feature of this kind of damages. Since these damages are assessed for punishment and not for reparation, *a positive element of conscious wrongdoing is always required*. It must be shown either that the defendant was actuated by ill will, malice, or evil motive. . . . , or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard of the rights of others.

(Emphasis supplied.) C. McCormick, *Handbook on the Law of Damages*, §79, p. 280 (1935).

> In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, the courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called "smart money." This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. [The punishment of his delinquency] depends upon the

> degree of malice, wantonness, oppression, or outrage of the defendant's conduct.

Day v. Woodworth, 13 How. 363, 371 (1852).

> Redress commensurate to such [personal] injuries should be afforded. In ascertaining its extent, the jury may consider all the facts which relate to the wrongful act of the defendant, and its consequences to the plaintiff; but they are not at liberty to go farther, unless it was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them. In that case, the jury are authorized, for the sake of public example, to give such additional damages as the circumstances require. The tort is aggravated by the evil motive, and on this rests the rule of exemplary damages.

Milwaukee & St. Paul Railway Co. v. Arms, 91 U.S. 489, 493 (1875).

See also: Restatement of Torts, §908 (1939) ("Punitive damages are awarded only for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others.")

Although punitive damages do, by their very nature, exceed the amount necessary to compensate a claimant, punitive damages are not *any* damages in excess of compensation. Punitive damages require egregious conduct and they are assessed solely for the purpose of punishing that conduct.

C. Interpretation Of The Term "Punitive Damages" In Accordance With Traditional Tort Principles Is Not Inconsistent With The Compensatory Purpose Of The Tort Claims Act.

The respondent relies heavily on the fact that the purpose of the Tort Claims Act is compensation.

However, the fact that the Act was intended to compensate federal tort claimants does not automatically lead to the conclusion that "punitive damages" are any damages in excess of compensation, regardless of whether they are labeled as compensatory damages under state law. Moreover, defining "punitive damages" as those damages intended to punish a tortfeasor for his egregious conduct is not inconsistent with this purpose. In enacting the Tort Claims Act, Congress simply intended to compensate claimants in accordance with state damage laws, and refused to allow awards of those damages which are not intended to act as compensation and are assessed solely on the basis of the degree of egregiousness of the tortfeasor's conduct.

D. The Seventh Circuit's Definition Of "Punitive Damages" Is Unworkable In Practice.

The respondent dismisses the petitioner's concerns about the unworkable nature of the Seventh Circuit's definition of "punitive damages" by claiming that the cases listed on pages 28-30 of the petitioner's brief, in which numerous types of damages were claimed to be "punitive," merely present three basic questions which are routine and can easily be answered. However, the respondent's attempt to simplify the application of the Seventh Circuit's definition fails to resolve the numerous problems which would be presented if this Court were to adopt the Seventh Circuit's definition.

The respondent believes that "punitive damages" should be defined as those in excess of the amount necessary to compensate the claimant. However, the

respondent fails to explain what it means by "compensate." If "punitive damages" are defined by federal law as those exceeding compensation, one would have to create a federal definition of "compensation." The state law definition of "compensatory damages" could not be used, because damages which are viewed under state law as being compensatory may be viewed under the respondent's definition as being, in fact, "punitive," because they exceed the amount necessary to compensate a claimant for his loss. Consequently, if the Court were to accept the respondent's definition of "punitive damages," the meaning of the word "compensate" would have to be redefined.

The respondent also fails to take into account the fact that acceptance of such a definition of "punitive damages" would result in assertions being made by the government in almost every case that the damages awarded under state law are "punitive". Because "punitive damages" would be defined as those in excess of the amount necessary to compensate the claimant, the government could always claim that any element of damages which is labeled by state law as being compensatory was actually "punitive" because it was not necessary to actually compensate the claimant. Assertions like this would continue to be made by the government until there developed an entire body of federal law defining exactly what types of damages could be recovered and the manner in which they are measured.

The respondent's contention that the implementation of the Seventh Circuit's definition of "punitive damages" would merely require the federal courts to resolve three

easily answered questions does not address these concerns. With respect to the first of these questions — whether the damages are excessive, the respondent contends that state law standards for the review of the excessiveness of damage awards will be sufficient to answer this question and thus implement the prohibition of "punitive damages." Resp. Br. 22. This statement is completely inconsistent with the respondent's position that state law or traditional tort law cannot be used to define "punitive damages." Moreover, the respondent fails to realize that in the numerous cases in which the government contended that an award of damages was "punitive," the award was one which state law considered to be compensatory, but the government claimed that state law should be ignored and the award viewed as "punitive" because it exceeded the amount necessary to compensate the claimant. If, in determining whether damages are "punitive," the government cannot accept a state's characterization of state law damages as being compensatory, then it is inconsistent for the government to now claim that a state's standards for determining the excessiveness of damages can be utilized in implementing the respondent's proposed definition of "punitive damages."

The second question which the respondent sees as being posed by the cases cited in the petitioner's brief is whether separate elements of damages are duplicative. The respondent asserts that this question generally only arises in cases concerning the deduction of federal income taxes from awards for lost future earnings and cases involving so-called collateral source payments by the government. The respondent asserts that this question can easily be handled merely by holding that federal

income taxes must be deducted from an award for lost future earnings and merely by determining whether the government is paying for more than the injuries it has caused.

The respondent has, however, underestimated the number of cases in which the government has claimed that damages are duplicative and therefore "punitive." This assertion has been made in more than just those cases involving deductions for federal income taxes and collateral source payments by the federal government. The government has contended, for example, that an award of damages for the value of the life of a decedent should be reduced by the amount of personal expenses the decedent would have incurred had he lived, *Hartz v. United States*, 415 F.2d 259, 264 (5th Cir. 1969). The list of cases on pages 28-30 of the petitioner's brief provides other examples of situations in which the government has claimed that damages were duplicative. Moreover, cases in which the government paid benefits to a claimant are not the only cases in which the government claimed that the collateral source rule did not apply. For instance, the government has claimed that a Tort Claims Act recovery should be reduced by the amount of worker's compensation benefits paid to a claimant, *Aretz v. United States*, 456 F.Supp. 397, 404-08 (S.D.Ga. 1978), affirmed, 604 F.2d 417 (5th Cir. 1979), and the government has claimed that funds provided to handicapped children by state and local governments should be deducted from a Tort Claims Act recovery, *Anderson v. United States*, 731 F.Supp. 391, 400-02 (D.N.D. 1990). If the Court were to accept the

Seventh Circuit's definition of "punitive damages," similar contentions would continue to be made by the government.

It is interesting to note that the respondent states that it does not claim that tort judgments against the United States should be reduced by the amount of benefits received by tort claimants from truly collateral sources. The petitioner submits, however, and the *Aretz* and *Anderson* cases are proof of this fact, that such an argument would be made at some point in time by the government, because allowing a claimant to receive both collateral source benefits and a tort judgment from the government for the same injuries would, according to the Seventh Circuit's definition, be "punitive" because the claimant would receive a recovery exceeding the amount necessary to compensate him or her.

The respondent claims that the third question raised by the petitioner's list of cases — whether damages are awarded for an inherently non-compensable loss -- will not arise frequently. To the contrary, however, the petitioner's list of cases evidences the fact that it has arisen frequently. The government has argued, for instance, that a plaintiff with cognitive ability may not recover damages for loss of enjoyment of life, *Burke v. United States*, 605 F.Supp. 981, 991-92 (D.Md. 1985); that a brain-damaged child may not recover damages for pain and suffering, *Shaw v. United States*, 741 F.2d at 1208; that a brain-damaged child may not recover damages for mental anguish, *Shaw v. United States, supra;* that a severely disabled child may not recover damages for lost earning capacity, *Anderson v. United States*, 731 F.Supp. at 402; that plaintiffs in a wrongful death action may not recover

damages for sorrow, mental anguish, loss of society and companionship and comfort, *Imperial v. United States*, 755 F.Supp. 695, 696-97 (N.D.W.Va. 1990); that a grandparent of a severely disabled child who stands *in loco parentis* may not recover for loss of consortium, *Anderson v. United States*, 731 F.Supp. at 402. The petitioner submits that the government would continue to make similar arguments that a certain element of damages is not recoverable because it is "punitive."

In sum, acceptance of the Seventh Circuit's definition of "punitive damages" would result in the elimination of a consideration of state laws of compensatory damages and thereby thwart the purpose of the Federal Tort Claims Act which is to provide compensation for tort claimants in accordance with state law. Instead of relying on state law, the federal courts would be required to develop an entire body of federal law delineating just exactly what elements of damages are recoverable under the Tort Claims Act and how those damages are to be measured.

II. THE DAMAGES FOR WHICH MR. MOLZOF SOUGHT RECOVERY ARE NOT "PUNITIVE" AND ARE NOT BARRED BY 28 U.S.C. §2674.

A. Robert Molzof Was Entitled To Recover Damages For Future Medical Care.

In arguing that the Seventh Circuit correctly denied any additional damages for future medical expenses, the respondent places great reliance on the determination of the district court that Mrs. Molzof had not sufficiently

established that she intended to transfer Mr. Molzof to a private hospital facility.

There is no authority which states that in order for a veteran to recover future medical expenses in a situation such as this, he or she must conclusively establish that he or she will seek medical care from private facilities in the future, rather than from a Veterans' Administration facility. Rather, the cases which have addressed the issue of whether a veteran, who brings an action under the Federal Tort Claims Act, may be compensated for future medical expenses even though the veteran is entitled to receive free medical care at Veterans' Administration facilities, have all held that the veteran must be given the *opportunity to choose* between private facilities and Veterans' Administration facilities. *Feeley v. United States*, 337 F.2d 924, 934-35 (3rd Cir. 1964); *Ulrich v. Veterans Administration Hospital*, 853 F.2d 1078, 1084 (2nd Cir. 1988); *Powers v. United States*, 589 F.Supp. 1084, 1108 (D.Conn. 1984); *Christopher v. United States*, 237 F.Supp. 787, 798 (E.D.Pa. 1965). Those cases specifically state that the veteran should not be forced to obtain medical care from the tortfeasor who necessitated the care.

In *Feeley v. United States*, the court stated:

> The plaintiff *may not* be satisfied with the public facilities; he *may feel* that a particular private physician is superior; in the future because of overcrowded conditions he *may* not even be able to receive timely care. These are only a few of the many considerations with which an individual may be faced in selecting treatment. The plaintiff's past use of the government facilities does not ensure his future use of

> them. He will now have the funds available to him to enable him to seek private care.

(Emphasis supplied.) 337 F.2d at 935.

Feeley does not state that the veteran must prove that he or she is not satisfied with the government facilities, or that he or she will be able to receive timely care at private facilities, or that he or she will seek private care. Instead, the court in that case indicated that the mere possibility that the veteran may not be satisfied with the public facilities or that he or she will not be able to receive timely care, warrants an award of damages to enable him or her to seek private care, if he or she so desires.

Similarly, in *Christopher v. United States*, 237 F.Supp. at 798, the court indicated that the veteran "has a right to select a private hospital or a physician of his own choosing *should he so desire in the future.*" (Emphasis supplied.) The court did not hold in that case that the veteran must select a private hospital or establish that he or she would select a private hospital, but rather only held that he or she should be given the opportunity to make the selection if he or she wished to do so.

Furthermore, in *Feeley v. United States*, 337 F.2d at 935, and *Ulrich v. Veterans Administration Hospital*, 853 F.2d at 1084, the courts specifically pointed out that it is irrelevant that the veteran has utilized the Veterans' Administration facilities in the past. If the veteran's past practice is irrelevant, so too are his or her future intentions. Regardless of past practice or future intentions, the veteran must be given the opportunity of choosing the type of facilities he or she desires.

Therefore, the factual determinations made by the district court are not determinative of the legal question of whether a veteran in Mr. Molzof's position should be entitled to recover damages for future medical care.

The respondent's assertion that the difference in benefits provided by 38 U.S.C. §351 and 38 U.S.C. §610 provides a sufficient reason for Congress' failure to provide in §610 a set-off of Tort Claims Act damages against future medical benefits, is not valid. Resp. Br. 30-31. Congress could easily have enacted a provision similar to §351 to avoid the potential for a double recovery in a Tort Claims action if the claimant veteran were entitled to recover free future medical care under §610.

B. An Award Of Damages For Loss Of Enjoyment Of Life Is Not Precluded By The Punitive Damage Proscription Of 28 U.S.C. §2674.

Relying solely on *Flannery v. United States*, 718 F.2d 108 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984), the respondent asserts that an award of damages for loss of enjoyment of life is not compensatory. However, another circuit court of appeals has characterized such an award as compensatory. In *Rufino v. United States*, 829 F.2d at 362, where damages to a comatose plaintiff for loss of enjoyment of life were held not to be "punitive," the Second Circuit reasoned:

> The purpose of a recovery for loss of enjoyment of life is clearly to compensate for that loss. The fact that the compensation may inure as a practical matter to third parties in a given case does not transform the nature of the damages. Indeed, such a rule, carried to its logical

> conclusion, would render all damages recovered by a decedent's estate punitive in nature.

This reasoning is applicable here. See also: *Flannery v. United States*, 297 S.E.2d 433, 438-39 (W.Va. 1982).

Moreover, since damages to a comatose plaintiff are not based on the egregiousness of the tortfeasor's conduct, but on the extent of the loss, they are not "punitive." Consequently, the question of whether such damages are allowable is a matter of state law. As the *Rufino* case stated:

> Whether loss of normal pursuits and pleasures of life is a separately compensable element of damages, and whether cognitive awareness is a necessary condition to such an award, are questions which — in this case — must be resolved according to the law of New York.

829 F.2d at 359.

In footnote 21 of its brief, the respondent misinterprets Wisconsin law by stating that "Wisconsin does not permit a plaintiff in a survival action to recover damages for the decedent's loss of enjoyment of life, specifically because such an award would violate the basic principle that tort damages are compensatory." Resp. Br. 34. The real reason Wisconsin does not permit a plaintiff in a survival action to recover damages for a decedent's loss of enjoyment of life is that the survival statute, sec. 895.01, Wis. Stats., only permits a survival action to be brought for personal injury damages suffered by the decedent *prior* to his or her death. Loss of enjoyment of life is obviously not a type of damage sustained by a decedent prior to death and that is why it is not

recoverable. This matter is clearly irrelevant to the question of whether Wisconsin would permit a living, though comatose, person to recover damages for loss of enjoyment of life.

CONCLUSION

The petitioner respectfully requests the Court to reverse the judgment of the Seventh Circuit, and to remand this case to the United States District Court for the Western District of Wisconsin for the entry of a judgment in the amount of $1,331,649.03, for the reasonable cost of medical care, and in the additional amount of $60,000, for loss of enjoyment of life.

Respectfully submitted,

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